



International drug policies and
cooperation under the framework of
the Three International Drug Control
Conventions: flexibility and evolution
in the regime?

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Abstract

The main objective of this thesis is to analyse and critically consider whether the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol; the Convention on Psychotropic Substances of 1971; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 are flexible enough to develop new and innovative strategies to tackle the World Drug Problem, considering that there are countries establishing new internal policies and strategies that are considered by the International Narcotic Control Board (INCB) and several other States as illegal. This will be done through an evaluation of the current International Drug Control Regime as well as by evaluating the practice and positions of such States. To understand the new positions emerging inside the current drug control regime, particular attention will be given to changing State views after the United Nations General Assembly Special Session of 2016 (UNGASS 2016).

This thesis will start with an historical analysis of the evolution of the International Drug Control Regime, in order to understand how it was built and what are the historical motivations that make this regime to be considered "repressive" by some States. The next chapter will address the theoretical framework necessary for this investigation. Specifically, it will consider international regimes, how they are constructed and modified by the relevant States or International Organizations. This will be complemented by an analysis of the different international instruments related to addressing the World Drug Problem, such as the Three International Drug Control Conventions.

The following chapters will address specific case studies that demonstrate how this international debate is affecting national policies and, directly and indirectly, the possibilities for effective international cooperation. The research will address, in particular, the withdrawal and re-accession of Bolivia to the Single Convention of 1961, the Portuguese strategies aimed at addressing its national drug problem in a very innovative way without going out of the framework of the three conventions, as well as the new

strategies regarding legalization of cannabis for recreational purposes implemented by Canada, Uruguay and some states of the United States.

The thesis will seek to answer the research question whether the regime is flexible enough to accommodate new interests and positions from States advocating for a change in international strategies aimed at addressing the World Drug Problem. How far can such States Parties act flexibly within the current regime? Or is it necessary to break, totally or partially, with the current regime to create innovative ways to address this global issue? By answering these questions, this Thesis will seek to demonstrate that the International Drug Control Regime based on the three conventions is flexible enough to accommodate the different interests of the Member States. Therefore, those strategies that seek to go beyond the limits of the regime and the conventions, such as the legalization of the use of narcotics for recreational purposes, would not be justified.

Glossary of terms

- **2009 Political Declaration:** 2009 Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem
- **2014 Ministerial Statement:** 2014 Joint Ministerial Statement of the High-Level Review by the Commission on Narcotic Drugs of the Implementation by Member States of the 2009 Political Declaration
- **CCPCJ:** Commission for the Prevention of Crime and Criminal Justice
- **CND:** Commission on Narcotic Drugs
- **DEA:** Drug Enforcement Administration
- **ECOSOC:** Economic and Social Council
- **EU:** European Union
- **IDCR:** International Drug Control Regime
- **INCB:** International Narcotic Control Board
- **UNCAC:** United Nations Convention against Corruption
- **UNGASS 2016:** United Nations General Assembly Special Session of 2016
- **UNODC:** United Nations Office on Drugs and Crime
- **UNTOC:** United Nations Convention against Transnational Organized Crime
- **USA:** United States of America
- **WEOG:** Group of Eastern European States and Others
- **WDP:** World Drug Problem
- **WHO:** World Health Organization
- **WTO:** World Trade Organization

**INTERNATIONAL DRUG POLICIES AND COOPERATION
UNDER THE FRAMEWORK OF THE THREE
INTERNATIONAL DRUG CONTROL CONVENTIONS:
FLEXIBILITY AND EVOLUTION IN THE REGIME?**

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Personal Note of the Author

During all the time that I have had the opportunity to serve my country as a diplomatic official, I have rarely encountered such an interesting but complex issue as that of international cooperation to address the World Drug Problem. Undoubtedly, being the official responsible of the Permanent Mission of Peru in Vienna in charge of the issues of the United Nations Office on Drugs and Crime has given me many opportunities and advantages for this investigation, but at the same time it has presented serious problems for me. The diplomat's job often involves defending the interests of your country despite having different personal positions. And many times, the defence of such interests must be so strong that you end up convincing yourself that this is the way things should be, despite having different personal positions. It can also happen that the defence made by other diplomats is so convincing that you question your own thinking as well as that of your country.

With regard to the subject of this investigation, the problems described in the previous paragraph have also been present. I have felt the need to write this research being as objective as possible, even though day by day I receive different instructions from my capital and hear very convincing arguments from other colleagues that made me rethink many times what has been expressed in this thesis. In the same way, I had to make an important effort to, at the time of writing, disassociate myself from my daily work, in such a way that I can have a more objective and "outside" vision. I must say that doing this required more effort than I thought, but I trust that I achieved it. However, having the possibility to have daily contact with such different positions, opinions and interests has given me the opportunity to develop a more critical capacity, and, despite the effort required, I believe that I have managed to understand the different arguments presented by the different States and International Organizations with a vision of an "outsider".

I must admit that I never imagined myself working in the multilateral sphere, much less being responsible for working on issues related to drugs and

crime, which are of special importance for my country. But this is probably one of the great advantages and challenges of the diplomatic career: being able to adapt to new situations, both personal and work related, and be willing to always have a mind eager to learn new things. I think these are some of the skills that I have been able to obtain in recent years and I hope they have enriched the present investigation.

One of the main inspirations I had when deciding to carry out this research was the fact of having assumed my current responsibilities in the middle of the negotiations of the Outcome Document of the UNGASS 2016. I remember that many questions that today are fundamental for the present essay emerged during that time. Why was it necessary to carry out UNGASS 2016 if, when it was convened, there were still 5 years left to fulfil the objectives agreed in the 2009 Political Declaration on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem? Why was there a certain number of States questioning the 2009 objectives? Why did they want to make it so different? Are the 2009 and 2016 documents so different from each other? Naturally, these questions were left in the background during the negotiation of the document resulting from UNGASS 2016, mainly because at that time I was a new official with clear instructions on what I should do. However, this research has allowed me to look at these questions from a new perspective and, although it does not help much, to realize that I could have done things differently as a delegate in the United Nations in Vienna. Maybe, these lessons will help me in the future.

Bearing this in mind, and due to my position as Peruvian Diplomat, some of the information used for this thesis, especially in chapter 5, has been acquired through my day to day work, which includes negotiations and conversations with other colleagues from different missions. Therefore, in some cases, it has not been proper or possible to make references to particular documents, and I have tried to reflect the general sense of the above mentioned meetings.

There is no doubt that I will continue to defend my country's position regarding how to address the World Drug Problem, as well as in any situation in which I need to do so. However, the development of the present investigation has shown me that it is not enough to obey the instructions coming from my capital. It is necessary to be able to objectively present all existing positions, as well as the opportunities that lie behind them. I consider that for a long time I devoted myself exclusively to seek arguments to convince my capital that the position we have always defended is the correct one. However, I observe that I am developing the capacity to provide added value to the reports, strategies and policies that I have been developing for the benefit of my country.

1. Introduction

Together we must honour the unanimous commitments made to reduce drug abuse, illicit trafficking and the harm that drug cause, and to ensure that our approach promotes equality, human rights, sustainable development, and greater peace and security¹

The message given by the Secretary General of the United Nations in 2017, unfortunately, does not reflect at present the total actions of the international community regarding how to address and counter the World Drug Problem (WDP), considering there isn't an actual consensus on which agreements should be applicable and honoured. Indeed, many agreements and commitments regarding how to tackle, or address, the WDP have been adopted on this matter since the beginning of the 20th century, some of them imposed by the great powers because of commercial, economic and even "moral" reasons, and others agreed at multilateral conferences with the participation of large numbers of Member States of the United Nations system. All this process led to the approval of the Single Convention of 1961², which sought to unify all the other agreements that had been achieved in the past, especially those regarding the cultivation of opium, adding coca leaf and the cannabis plant. After the entry into force of this Convention, the current International Drug Control Regime (IDCR) began to take shape, and various additional documents, both hard and soft law instruments, in the form of conventions, resolutions and political statements started to complement it. However, as it has been said, today there is no unanimous agreement between which of these agreements and commitments should be respected, which are no longer relevant, which should be reviewed, and which should only be accepted in part.

Illicit drug trafficking is a very complex and global-scale criminal phenomenon, although its impact is seen locally both on the streets and in

¹ Antonio Guterres. (Message delivered by the United Nations General Secretary Antonio Guterres on the International Day against Drug Abuse and Illicit Trafficking, New York, 26 June 2017) <<https://www.unodc.org/listenfirst/en/WDD/sg-statement-2017.html>> accessed 6 July 2018

² William McAllister, *Drug Diplomacy in the Twentieth Century* (Routledge 2000) 185-211

homes. It is absolutely necessary that national and international policies to address the WDP take into account this transnational character³, the global context in which it operates, its expansion networks, as well as the tools provided by the international legal system to combat it.

Considering the complexity of the problem, we find for example, and from a fundamentally economic point of view, the case of micro-marketing, through which people seek to solve social problems such as the "unemployed mother" who needs to work in one way or another to satisfy primary needs. In this sense, it is evident that for some States the problem of illicit drug trafficking is often linked to a development problem due to lack of opportunities, although it could also be argued that micro commercialists are often people who may need incomes precisely to continue consuming, which refers to a health aspect that has to be addressed, or simply young adventurers who see in the sale of drugs the possibility of knowing a different life, bringing us to the problem of education⁴.

Continuing with a fundamentally economic analysis, it is worth mentioning the large criminal organizations, which are those that really benefit substantially from this illicit business⁵. These organizations are directly responsible for the crimes derived from the illicit drug trafficking, such as asset laundering, corruption, human trafficking, environmental crimes, among others, and many times they take advantage of the needs of the people who are below in the criminal chain to identify possible helpers⁶. But these organizations, as has happened for a long time, for example in the case of Colombia, have also acted as economic agents for the benefit of poor populations, providing them with resources and even services that they lacked due to the absence of the State. In that sense, illicit drug trafficking,

³ Alan Dupont, 'Transnational Crime, Drugs, and Security in East Asia' (1999) 39(3) Asian Survey 433.

⁴ Angus Bancroft, *Drugs, intoxication and society* (Polity Press 2009)

⁵ Margaret Beare, *Critical reflections on transnational organized crime, money laundering and corruption* (University of Toronto Press Incorporated 2003) 145-159

⁶ Matthew Jenner, 'Drug Trafficking as a Transnational Crime' in Philip Reichel and Jay Albanese (eds): *Handbook of Transnational Crime and Justice*. Edited by REICHEL, Philip and ALBANESE, Jay (SAGE 2014)

mainly in remote areas of Latin America, Asia and Africa, has become one of the main economic activities that, although it continues to benefit mostly the large criminal organizations, has had a positive impact on the development of the population⁷.

Another aspect to consider is the one related to security. This is based not only on the large criminal organizations and their link to the illicit drug trafficking and related crimes, but also on the fact that drugs are often used to finance terrorist groups. Following Michael Braun, it can be said that the links between illicit drug trafficking and terrorists' organizations has been identified and tackled for many years.⁸

There often is a nexus between terrorism and organized crime, including drug trafficking. Links between terrorist organizations and drug traffickers take many forms, ranging from facilitation -- protection, transportation, and taxation -- to direct trafficking by the terrorist organization itself in order to finance its activities. Traffickers and terrorists have similar logistical needs in terms of material and the covert movement of goods, people and money⁹.

The WDP has also been widely recognized as a constant source of impairment of the rights of individuals and societies in crucial areas such as health and safety¹⁰. The abuse of these substances can cause imbalances in the behaviour and in the normal activities of people within their social environments, affecting their capacity for decision taking and self-determination. The daily activities of drug addicts, in the levels concerning

⁷ Jon Lee Anderson, 'The Afterlife of Pablo Escobar'. (*The New Yorker* 5 March 2018). <<https://www.newyorker.com/magazine/2018/03/05/the-afterlife-of-pablo-escobar> > accessed 23 November 2018

The case of Pablo Escobar is probably one of the most enigmatic in this regard. During his life he was nicknamed "the Robin Hood Paisa" (paisa is the name given to the inhabitants of Medellin), for the "benefits" he gave to the communities most in need.

⁸ Michael Braun, 'Drug Trafficking and Middle Eastern Terrorist Groups: A Growing Nexus'. (*The Washington Institute for Near East Policy* July 25 2008) <<https://www.washingtoninstitute.org/policy-analysis/view/drug-trafficking-and-middle-eastern-terrorist-groups-a-growing-nexus>> accessed 18 June 2018

⁹ Rand Beers and Francis Taylor, 'Narco-Terror: The Worldwide Connection between Drugs and Terror.' (*U.S. Department of State* 13 March 2002) <<https://2001-2009.state.gov/p/inl/rls/rm/8743.htm>> accessed 17 December 2017

¹⁰ David Rudy and James Orcutt (eds), *Drugs, alcohol, and social problems* (Rowman & Littlefield 2003)

the family, work, school, sports, social, among others, are also affected.¹¹ That means, drug addicts do not only harm themselves but also their social environment, leading in serious and extreme situations to violence.

The harmful effects of drugs to society has been widely described by academia, international organizations, civil society, state actors, among others.

Many of the costs of drug addiction go beyond the user. (...) Most crimes related to drugs involve theft of personal property—primarily, burglary and shoplifting—and, less commonly, assault and robbery (often mugging). Estimates are that a heroin addict must steal three to five times the actual cost of drugs to maintain the habit, or roughly \$2000,000 per year¹².

Bearing this in mind, there is an effect not only in the livelihood of the people but also in their economy. Thus, it is understandable that a high involvement from the States is necessary to address these effects, especially when the criminal activities caused by drugs have a direct relation with organized crime organizations and other types of crimes such as human exploitation and human trafficking, terrorism, environmental crimes, among others.

It should be taken into consideration that, as a global phenomenon, the WDP goes beyond any state limit¹³, being a phenomenon of destabilizing nature. The criminal chain includes producers, traffickers and consumers, each of them with its own share of fault. As it was said by Willy Stevens, *“the illegal narcotics industry is the largest and most perverse multinational in the world. It has a turnover of around 400 billion dollars, that is, 8% of*

¹¹Ross Coomber, Karen McElrath, Fiona Measham and Karenza Moore. *‘Key Concepts in Drugs and Society’* (SAGE 2013)

¹² Glen Hanson, Peter Venturelli and Annette Fleckenstein. *Drugs and Society*. (12 edn, Jones & Bartlett Learning 2015)

¹³ United Nations Office on Drugs and Crime, *‘The Globalization of Crime: a Transnational Organized Crime Threat Assessment’*. (UNODC, 2010) <https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf> accessed 11 January 2017

world trade. It far exceeds the oil industry, for the defence of whose interests there is no doubt at times in unleashing wars”¹⁴.

States, considering the global dimension the WDP, have created an international regime to address it in a collaborative way; a regime that is currently based in the principle of common and shared responsibility, which will be explained later in more detail. The current IDCR did not develop overnight. It is the result of an enormous evolution that can be tracked many centuries ago, although it can be argued that the Opium Wars represent a notable milestone for the regime States apply currently.¹⁵ It is worth noting how narcotic drugs were considered for many years as a very lucrative legal business that was even promoted by the Governments of the States that nowadays are leading the international cooperation to address the WDP *“recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind”* and *“conscious of their duty to prevent and combat this evil”¹⁶.*

The reasons why States decided to switch from a regime that allowed narcotic drugs trafficking for recreational purposes into a regime that has been characterized by many as punitive (and for some unduly repressive) against all the chain of what nowadays is illicit drug trafficking will be further developed in the historical review chapter of this research. Nevertheless, it is worth mentioning at this point that “moral issues” played a very important role for this change. All the way back to the opium wars, we see that China tried to forbid opium trade because of “moral issues”, considering its harmful effect to users. Many years later, and because of the pressure of the church, cocaine consumption, which was very popular around wealthy people in developed States, even United States, was also forbidden¹⁷.

¹⁴ Willy Stevens, *Desafíos para América Latina* (Aguilar Editorial 1999) 361. (Authors own translation) Undoubtedly, the figures indicated have grown substantially in the last 20 years.

¹⁵ This idea will be further developed in the Historical Review Chapter of this research.

¹⁶ Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol (adopted 25 March 1961) 1.

¹⁷ Paul Gootenberg, *Cocaine: Global Histories*. (Routledge, 1999) 25

As it will be addressed on a later stage, “morality” has been a key issue in the construction, development and change of the international drug control regime. Nowadays, certain States have begun to argue that the current regime is, in a certain way, immoral, considering that it focuses more on prosecuting the people involved in the criminal chain of drugs rather than on reinserting them into the society, especially the micro-traffickers and addicts, which, according to them, would be the right and moral thing to do.¹⁸

It has also been recognized on many occasions that illicit drug trafficking, associated with organized international crime, has an enormous capacity to update and modernize itself¹⁹. For example, in the case of the Americas, Bruce Bagley has found many reasons why this change keeps happening, like

“the increasing globalization of drug consumption; the limited victories and unintended consequences of the U.S.-led ‘War on Drugs’; the proliferation of cultivation areas and of drug smuggling routes; the dispersion and fragmentation of organized criminal groups; the failure of political reform and state-building efforts; the inadequacies U.S. domestic drug and crime control policies; the ineffectiveness of regional and international drug control policies; and the growing support for legalization debate”²⁰.

In that sense, States have been arguing in the framework of the Commission on Narcotic Drugs (CND), the leading United Nations entity for international cooperation to tackle the WDP, and in many different forums, that the national and international strategies to fight against this crime

¹⁸ Pablo de Greiff (ed). *‘Drugs and the Limits of Liberalism. Moral and Legal Issues*. (Cornell University Press 1999)

¹⁹ Felipe Calderón. *‘Drug Trafficking and Organized Crime’*. (*Harvard International Review* 8 September 2015) <<http://hir.harvard.edu/article/?a=11786>> accessed 23 March 2018

²⁰ Bruce Bagley, *‘The evolution of drug trafficking and organized crime in Latin America’* (2013) 71 SPP 99, 100-123

should have the same capacity for evolution and modernization²¹. Former President of Colombia Juan Manuel Santos, on April 2018, requested the international community to “*open their eyes and to recognize that if they continue doing the same, the same results are going to be achieved: more people in jail, more deaths, and stronger organized criminal groups*”²².

In order to address these multidimensional aspects that have been described above, Member States from the United Nations system agreed on three international instruments that for many years were recognized as the cornerstone of the IDCR: the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol; the Convention on Psychotropic Substances of 1971; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. These three instruments have given life to organizations, such as the International Narcotics Control Board (INCB) and related documents such as the 2009 Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem (2009 Political Declaration); the 2014 Joint Ministerial Statement of the High-Level Review by the Commission on Narcotic Drugs of the Implementation by Member States of the 2009 Political Declaration (2014 Ministerial Statement) and the United Nations General Assembly Special Session on the World Drug Problem Outcome Document entitled “Our joint commitment to effectively addressing and countering the World Drug Problem” (UNGASS 2016 Outcome Document).²³

The three conventions have modelled the IDCR over the past six decades, until their status as the cornerstone of the regime has been challenged in the last 10 years by countries that argue that these documents are insufficient to address all aspects of the WDP. Therefore, they argue that it

²¹ Paoli Greenfield. ‘If supply-oriented drug policy is broken, can harm reduction help fix it? Melding disciplines and methods to advance international drug-control policy’. 23(2) IJDP 6

²² El Espectador ‘Santos insiste en la necesidad de replantear la guerra contra las drogas’. (El Espectador Bogota, 24 April 2018) <<https://www.elespectador.com/noticias/politica/santos-insiste-en-la-necesidad-de-replantear-la-guerra-contra-las-drogas-articulo-751866>> accessed 7 November 2018. (Author’s own translation)

²³ United Nations General Assembly ‘International cooperation to address and counter the world drug problem’ (22 Jan 2019) UN Doc A/RES/73/192

is necessary not to focus only in the three conventions but to expand the main reference documents, including, for example, the 1948 Universal Declaration of Human Rights and the UN Charter, considering that these documents might be useful to address topics concerning the WDP not fully covered in the three conventions, such as human rights and health related issues. In the same line, the countries arguing that the three conventions are not enough to address all aspects of the WDP would like to put aside commitments adopted before UNGASS 2016, which, according to them, was able to strengthen and broaden the international response towards the drug problem in issues that are not even fully covered in the drug conventions or documents such as the 2009 Political Declaration.

It is understandable that there are States that question not only the morality of the current regime but also whether international instruments that have been in existence for more than 60 years continue to provide a sufficient and necessary legal framework to address the WDP. The countries leading these efforts against the current international Drug Control System are Mexico, Canada and Uruguay. In the particular case of Canada and Uruguay, these countries are not only advocating for the necessity of reviewing the current regime but have already broke with it, considering they have legalized cannabis for recreational purposes²⁴. Colombia was part of these group of States when this research began. Nevertheless, and after the last presidential elections that were won by Iván Duque Márquez, Colombia went back to defending traditional strategies and to apply harder law enforcement strategies. The European Union (EU), with some exceptions, is having a more balanced approach and advocates for the implementation of the UNGASS 2016 Outcome Document, while recognizing the value of previous commitments. Finally, the countries defending the current international drug control system are the ones of the Asian Group, the African Group, as well as those from Eastern Europe and some from the Latin American and the Caribbean Group. The United States

²⁴ International Narcotics Control Board, 'INCB Report 2018' (*International Narcotics Control Board*, 2019) < <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2018.html> > accessed 11 January 2019

of America (USA) is still committed to the implementation of the three conventions²⁵, although some states such as California, Washington, Colorado, Main, Nevada, among others, do allow Cannabis for recreational purposes, which is still prohibited on a federal level.

This search for change within the IDCR is not limited only to the documents agreed upon by all States, but also to changes that involve the international organizations in charge of drug issues. Since the creation of the CND, the Member States of the Economic and Social Council (ECOSOC) have agreed that the aforementioned commission would be the leading institution in the field of international cooperation to address the WDP²⁶. The international community also recognized that there are other agencies that should support international efforts to fight against drugs, such as the World Health Organization (WHO), UN-AIDS, the Human Rights Council, among others. However, what has been seen in recent years is an attempt by countries seeking to change the international drug regime to prevent Vienna, headquarters of the CND, from continuing to be the main forum where this issue is discussed. *“The Vienna consensus is considered a hurdle to progress on human rights because it mutes criticism of States practices that violate human rights”*²⁷. These States have increasingly promoted the role of the Human Rights Council²⁸ and the WHO, putting it almost on par with the CND, arguing that the human rights, health and social aspects of the WDR are as important as the political issues covered by the commission and, thus, these institutions should have a bigger say in the establishment of international strategies. This has caused a strong response from the States that, while recognizing the importance of inter-institutional cooperation, still consider that Vienna and the CND must

²⁵ United States Mission to the United Nations, *Global Call to Action on the World Drug Problem* (24 September 2018) <<https://usun.state.gov/remarks/8629>> accessed 26 February 2019

²⁶ United Nations General Assembly ‘Our joint commitment to effectively addressing and countering the world drug problem’ (19 April 2016) UN Doc A/RES/ S-30/1

²⁷ Neil Boister, ‘Waltzing on the Vienna Consensus on Drug Control: Tensions in the International System for the Control of Drugs’ (2016) 29(2) LJIL 389

²⁸ Human Rights Council ‘Contribution to the Implementation of the Joint Commitment to Effectively Addressing and Countering the World Drug Problem with Regard to Human Rights’ (23 March 2018) HRC doc A/HRC/37/L.41

exercise leadership in what corresponds to addressing the global problem of drugs, fundamentally as a matter of coordination.

As it has been mentioned, the group of countries fighting for a change in the regime wish to broaden the debate in thematic terms bringing more UN organizations on board, but they also wish to find forums where they can have more support from other Member States. The strategy promoted by this group of countries has been successful, for example, among the small island States in the Caribbean, which for the most part are not represented in Vienna. In this sense, managing to take the debate to spaces like New York and Geneva, there is the possibility of increasing voices of support on the need to review the current regime.

1.1 Literature review

The history of drugs and the approach to the WDP are subjects that have been recurrently addressed in diplomatic debate, popular writings and academic literature. Additionally, a large part of the official material in this regard can be obtained directly from United Nations publications such as the World Drug Report²⁹. However, during the realization of this thesis, it has been clear that in recent years there has been an interesting change in relation to the publications on the WDP, and that many NGOs have led this change, focusing on what can be described as new ways to address the WDP with a special focus on human rights and public health.

One of the distinctions that can be made in terms of literature is that which presents concrete analyses of events and policies, such as those dedicated to policies considered "repressive", or those that are limited to presenting specific data. Among the latter, it is worth mentioning "The War on Drugs: An International Encyclopaedia", a compilation of data by Ron Chepesiuk that deals with a great diversity of aspects such as names, dates and events representative of the history of the fight against drugs³⁰. In the same way,

²⁹ United Nations Office for Drugs and Crime, 'World Drug Report 2018'. (UNODC, 2018) <<https://www.unodc.org/wdr2018/>> accessed 1 February 2019

³⁰ Ron Chepesiuk. *The War on Drugs: An International Encyclopedia*. (ABC-CLIO 1999).

this publication has made it possible to expand issues through the revision of more extensive and specific works.

Lots of the existing literature regarding this topic explains the history of the War on Drugs and the different consequences this has had tackling the WDP. For example, Frank Sanello³¹ and Julia Lovell³², among many others, provide very interesting information on how the relation between countries has always had a very important influence of the International Drug Policies, starting in the Opium Wars, which is one of the starting points of this research, bearing in mind that Opium Wars is one of the first scenarios where drug policies played an important role in the configuration of an international system³³. There are many other researches that provide an historical overview on how drug traffickers have managed to adapt themselves to the different policies, and how theoretically punitive and law enforcement strategies had a minor effect addressing this problem. For example, Penny Green shows that many times the people on whom the law is applied most harshly and effectively are those who are below the criminal chain, which would show that punitive policies are aimed at creating a kind of illusion in relation to the success of said measures.³⁴

It is relevant to notice that there are many specialized articles and research works stating that the War on Drugs, as well as the traditional International Drug Policies, have failed³⁵. Dirk Chase, in "Ending the War on Drugs: a solution for America"³⁶, believes that the War on Drugs has brought more violence, and that the ones who suffer the most from this violence are not the heads of the illegal organization but minor players in this problem. This book is especially interesting given that it is written from a republican perspective, with Republicans in the United States being the most

³¹ Frank Sanello and Travis Hans, *Opium Wars: The addiction of One Empire and the Corruption of Another*. (Sourcebooks, 2002)

³² Julia Lovell. *The Opium War: Drugs, Dreams, and the Making of Modern China*. (Overlook Press 2011)

³³ Yangwen Zheng, *The Social Life of Opium in China*. (Cambridge University Press 2005)

³⁴ Penny Green, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Waterside Press 1998)

³⁵ Paula Mallea, *The War on Drugs: A failed experiment*. (Dundurn 2014)

³⁶ Dirk Chase, *Ending the War on Drugs: a solution for America*. (Bridge Works 1998)

conservative in terms of drug policies. However, Chase argues that traditional policies have failed, and proposes a controlled legalization of consumption. In the same line, authors such as Lisa Moore and Amy Elkavich³⁷; Letizia Paoli, Victoria Greenfield and Peter Reuter³⁸; Christopher Coyne and Abigail Hall³⁹; among many others, argue that the War on Drugs has caused many more damages than successes, and that there is a need to rethink in a complete and comprehensive way the strategies to address the WDP.

On the other hand, it is more difficult to find articles or research works defending the validity of the traditional International Drug Policies and the current regime. Although there are national studies from countries defending these policies that are going to be very useful for this research⁴⁰, as well as documents from UNODC, which show the success from these policies, there appears to be a consensus among scholars about the failure of these policies⁴¹. This difference between academic, journalistic and State publications is reflected even when in theory they seek to defend similar positions. For example, while the States that defend the document resulting from UNGASS 2016 and critics of the current regime point out that 2016 marked an unprecedented milestone in tackling the WDP, several NGOs and members of the academia pointed out their disappointment that the UNGASS 2016 did not go as far as they have expected in terms of the

³⁷ Lisa Moore and Amy Elkavich, 'Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health'. (2016) 98(5) AJPH 176

³⁸ Letizia Paoli, Victoria Greenfield and Peter Reuter. 'Change is Possible: The History of the IDCR and Implications for Future Policymaking'. (2012) 47(8-9) SUM 923.

³⁹ Christopher Coyne and Abigail Hall, 'Four Decades and Counting: The Continued Failure of the War on Drugs'. (*Cato Institute*, 12 April 2017) <<https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs>> accessed 23 April 2018

⁴⁰ United Nations Office on Drugs and Crime and the Peruvian National Commission on Life And Development without Drugs (DEVIDA), 'Desempeño Comercial de las Empresas Promovidas por el Desarrollo Alternativo Perú. (UNODC and DEVIDA, 2012) <https://www.unodc.org/documents/peruandecuador/noticias/Noticias2013/Julio/Presentacion_FINAL_FT_Empresas_2013_2606.pdf> accessed 12 March 2017

⁴¹ Marjorie Ester Dias and Divane de Vargas. 'Harm Reduction: an alternative to the failure of the War on Drugs'. (2015) 20(1) *Cogitare Enfermagem* 205

variation in drug control strategies⁴², indicating that an even greater human rights approach was necessary⁴³.

What is interesting about the existing literature and information on this topic is that, considering that UNGASS 2016 was held less than three years ago, many journalists have been writing about this process and many scholars have been expressing their views about what could be expected from this process, although there has not been enough time to evaluate the effectiveness of the recommendations approved that year⁴⁴. During the last session of the CND, as well as during the UNGASS 2016, several Side Events were organized where experts could exchange point of view about the success or not of the International Drug Policies, as well as about the need or not of building a new consensus.

The analysis of international documents and agreements will be a very important source for this research, considering that these have been challenged by several actors. Are the three International Drug Conventions flexible enough to support changes in the traditional International Drug Policies? Will there be a need to review these international instruments? These are only some of the answers that the above-mentioned documents could provide for the purposes of this research.

As has already been pointed out, there is plenty specialized literature on the WDP, although most of it agrees in criticizing the "War on Drugs". In the same way, this work has been able to identify relevant publications related to the theory of international relations, such as those dedicated to the theory of international regimes⁴⁵ and international treaties⁴⁶, which is the central theoretical aspect of this research.

⁴² John Collins, 'Losing UNGASS? Lessons from civil society, past and present' (2017) 17(2) DAT 88

⁴³ Alexander Henderson, 'The Outcome of UNGASS 2016: Perpetuating Failure' Michigan State University College of Law (April 2016) <<https://www.msuir.org/msuir-legalforum-blogs/?tag=Alex+Henderson>> accessed 28 February 2018

⁴⁴ UNGASS 2016 Outcome Document contains seven thematic chapters regarding how to address the WDP. Unlike previous documents, it focuses more on aspects related to human rights and addressing the public health aspect of the WDP.

⁴⁵ Stephen Krasner, *International Regimes*. (Cornell University Press 1983)

⁴⁶ Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) BIICL 902

In general terms, most of the specialized literature and data provided by the United Nations and other relevant international agencies agree on one thing: the international community is just as far from winning the War on Drugs as it was 50 years ago⁴⁷. However, just indicating that the War on Drugs, as well as those strategies directed to an effective application of the law, are the real problem, is no accurate, especially because other strategies that go beyond the framework of the three conventions are not being successful. In various works related to the WDP, it is said that "comprehensive" strategies and policies should be established. But what does this really mean?

This is one of the questions that brings us closer to the objective of this investigation. The current international debate, as has been pointed out, focuses on the strategies to be followed by the international community to successfully address the WDP, mainly after 2019⁴⁸. This debate focuses on the struggle between the "traditional" strategies versus "innovative" strategies; whether if it is necessary to maintain the 2009 objectives or if the International Community should only focus on the 2016 operational recommendations; and if it is necessary to maintain the current regime, modify it or break it.

This research does not intend to provide a solution to the WDP. However, it seeks to demonstrate that the current international regime offers sufficient flexibility to try to implement sufficiently innovative strategies that can address a clearly different reality than the one 50 or 60 years ago. In short,

⁴⁷ United Nations Office for Drugs and Crime, 'World Drug Report 2018'. (UNODC, 2018) <<https://www.unodc.org/wdr2018/>> accessed 1 February 2019

The UNODC World Drug Report 2018 shows that both consumption and production have either maintained or increased in the last decades. These data has been consistent during the last years, although, as established in the report, there are some strategies in different countries that have proven to be successful, such as decriminalization of consumption in Portugal or Alternative Development Programs in Peru. It should also be noted that, according to the report, the so-called "innovative" strategies that often escape the framework of the three conventions are also responsible for maintaining and increasing the problem, which is demonstrated by the massive increase in illicit coca leaf crops in Colombia.

⁴⁸ 2019 was established as the "target date" in the 2009 Political Declaration in order to fulfill 5 objectives regarding demand reduction, supply reduction and international cooperation. The international community has been discussing if these objectives will remain valid after this target date, considering that they have not been achieved.

it is not about focusing on the effective application of the law, on the fight against drug production or on the subject of public health. It is about applying all these strategies in a joint and coordinated manner, through efficient international cooperation. And this is where the comprehensive nature of the fight against drugs is based.

1.2 Objectives and Hypothesis

The main objective of this thesis is to analyse and critically consider whether the Three International Drug Control Conventions are flexible enough to develop new and innovative strategies to tackle the WDP, considering that there are countries establishing new internal policies and strategies that are considered by the INCB and several other States as illegal.⁴⁹ This will be done through an evaluation of the current International Drug Control Regime as well as by evaluating the practice and positions of such States. To understand the new positions emerging inside the current drug control regime, particular attention will be given to changing State views after the UNGASS 2016. This will help to determine if the regime, as it was understood during the last decades, is flexible enough in order to accommodate the new interests and positions from States advocating for a change in the international strategies aimed to address the WDP, or if States have actually exhausted every possibility provided by the Three International Drug Control Conventions and other related documents and, thus, it is necessary to break, totally or partially, with the current regime in order to create innovative ways to address this global issue.

This thesis recognizes that the year 2016 marked a break within the regime for some States, International Organizations and Civil Society, considering that, in theory and per them, the punishment-based approach was abandoned, and a more "humane" view of the WDP was adopted. If the aforementioned breakthrough really happened at UNGASS in 2016, it would make sense to assume that the objectives set out in the 2009 Political

⁴⁹ The specific roles of INCB, CND and UNODC will be described in chapter 4.

Declaration, which are based on traditional strategies of supply control, demand control and international cooperation, should have lost their validity. This idea, however, is still rejected by most States, considering the statements that have been delivered during the 2017, 2018 and 2019 regular sessions of the CND⁵⁰.

The Political Declaration of 2009 and its Action Plan established the year 2019 as the target date for the fulfilment of the objectives established in the document. Bearing this in mind, there are two clearly differentiated positions around the future of this document. On the one hand, there are States that indicate that the UNGASS 2016 Outcome Document overcame all other documents, and therefore should be the only instrument of reference. On the other hand, there are States that consider that no document approved by the international community indicates that the 2009 goals will no longer be valid and, therefore, the 2009 and 2016 documents are complementary and mutually reinforcing and should be given equally importance.

Currently, the international community is involved in the discussion regarding what the future of the international drug regime will be towards the next decade, as well as which documents will be the ones that should be implemented. For the purposes of this research, and although this idea will be developed in greater detail later, it is worth mentioning that this thesis starts from the basis that, in effect, there is no justification to indicate that the Political Declaration of 2009 should lose validity. If this were the case, there would be a need to negotiate a new political commitment to guide the work of the international community on cooperation to combat the WDP, because even the UNGASS 2016 outcome document reaffirms the 2009 Political Declaration. However, the only consensus that exists today is that the Member States do not want to engage in a new negotiation on a policy document for the future.

⁵⁰ These differences in perception among the different Member States will be explained in greater detail in later chapters of this thesis.

The current IDCR is the result of the development of the interests of some States that were imposed at the end to the ones that did not have a huge say when the regime was created. Nevertheless, and considering the last international developments that have significantly change the relation between States and other global actors such as globalization, international commerce and the evolution if the international law, all States have interests in establishing successful strategies to deal with the WDP. Bearing this in mind and considering that States are struggling between each other about the future of the regime, all sides are trying to bring more States and actors on board their positions, regardless of its relative international importance.

The main hypothesis of this research is that the current regime based in the Three International Drug Control Conventions is flexible enough in order to accommodate new and innovative strategies to address the WDP and, thus, there is no need for a major change. It would be inaccurate to say that the current regime is perfect and that it will surely be enough to “win the War on Drugs”. After more than 60 years following this regime and noting that the international community is no closer to win the war than Richard Nixon was in the seventies, it is clear that something is failing.

This brings us to one of the specific research questions of this thesis, which is whether it is not the regime what is preventing States to efficiently address the WDP but the way in which States are implementing its provisions. The answer to this question is a major determinant of the regimes ongoing and future effectiveness. As it has already been mentioned, the international community, concerned about the impact of drugs on public health, established a regime aimed at prohibiting a series of substances and to establish concrete measures to eliminate their production, distribution and consumption. The preamble to the 1961 unique convention speaks of a concern for the physical and moral health of humanity. It should be noted that at this time the illicit drug trafficking economy began to grow exponentially. As happened during the era of prohibition in the United States, there are those who point out that prohibiting the free traffic and consumption of psychotropic substances put the business in the hands of

criminal organizations⁵¹, and has created enormous illegal funds that stimulate corruption and armed conflicts throughout the world. States apply strategies to address problems based on specific contexts. If these contexts and situations change, the strategies may also vary. In this sense, based on the principle that the three conventions grant enough flexibility to adapt to the new realities, there is the possibility that, as has been said, the regime is not the problem, but the way in which the States are addressing the different opportunities that the regime grants to adapt to these new realities.

1.3 Structure

In order to achieve the objectives and goals expressed, this research will include 8 chapters after this introduction. In the first place, and as already indicated, chapter 2 will include an historical analysis of the international drug regime, to understand how it was built and what are the historical motivations that make this regime to be considered "repressive" by some States. Specifically, it will begin with a brief analysis of the opium wars, considering that it is one of the first and main international contexts that were caused by drug control issues and that had a global effect with repercussions that lasted many years after the wars ended.

Another reason why it is relevant to analyse the opium wars is that it is the beginning of a "moral" debate on what the behaviour of States should be in relation to consumption and trade of narcotics. One of the fundamental causes that gave rise to the opium wars was the fact that China sought to prevent the trade of this good by referring to the the health problems and moral decadence that opium caused. On the other hand, the United Kingdom, France and, later, the Russian Empire and the United States sought to liberalize the opium trade due to the large profits that this economic activity represented. This moral debate regarding the approach to the WDP continues to this day, and the moral issue is one of the main arguments to question the current drug policies.

⁵¹ Mary Evans F, Eric Helland and Jonathan Klick, 'The Developmental Effect of States Alcohol prohibitions at the turn of the twentieth century'.(2016) 54(2) Economic Inquiry 762

Once the historical context of the international drug control regime is established, chapter 3 will address the theoretical framework necessary for this investigation. Specifically, it will be useful to establish what should be understood as international regimes, how these are constructed, vary, are modified or finished by the States or international Organizations, among others. In general terms and considering the existing discrepancies regarding the approach to the WDP, it is especially important to understand why it is that States decide to establish international regimes to deal with specific issues, giving, to some extent, part of their freedom to establish the strategies and policies that they wish most freely. Once this theoretical framework is established, it will be determined how it should be applied to the international narcotics control regime based on the 3 international conventions as its cornerstone.

Also, chapter 3 will address other fundamental definitions to understand the current IDCR such as the principle of common and shared responsibility. Later, it will establish the main differences between the legal instruments belonging to the regime that can be categorized into "soft law" and "hard law".

Chapter 4 will go deeper into the analysis of the different international instruments related to addressing the WDP. The three principal international conventions will be a fundamental aspect of this analysis, given that it is necessary to be able to establish, based on a thorough reading of these documents, if they effectively provide sufficient flexibility to apply innovative strategies, or if they really are already outdated.

Chapter 5 will deal more specifically with the current situation of the international drug control regime, presenting in a more detailed manner the different international positions that exist regarding how to deal with this matter. This chapter results in the logical sequence of the historical review, given that it is important to understand why there is currently a problem in terms of reaching consensus on the most effective way to address the WDP.

Chapters 6, 7 and 8 will address specific case studies that demonstrate how this international debate is affecting national policies and, directly and

indirectly, the possibilities of effective international cooperation. Chapter 6 will focus on one of the most emblematic cases of recent years in relation to the IDCR, which was the withdrawal and re-accession of Bolivia to the Single Convention of 1961. This case will clearly show how the Bolivian State found an unconventional way of being able to make a reservation to the aforementioned convention, in order to remain within the international regime, without violating international commitments, but at the same time being able to respond to their national interests. Although the international community was involved in a complex debate to determine if what was done by Bolivia or could not be considered "legitimate" given the nature of the regime, the country finally managed to accommodate the international regime to their wishes.

Chapter 7 will address one of the most iconic examples in terms of establishing effective and innovative strategies, which is the case of Portugal. That country, at the end of the 1990s, broke many international schemes and paradigms in relation to what was considered necessary to effectively address the WDP. In fact, the strategies of Portugal, which were based on the decriminalization of the consumption of narcotics, among others, were so innovative that it was not clear at the time if they were inside the framework of the Three International Drug Control Conventions. The INCB, for many years, indicated that the decriminalization of consumption was not allowed within the conventions. However, this conclusion was based on a specific reading. In chapter 6 different approaches will be observed regarding the different ways in which the conventions can be interpreted. This will show that the conventions were and continue to be sufficiently flexible, it being necessary for the Organizations part of the regime and for the Member States to adapt to this flexibility.

After establishing the most important aspects of the Portuguese strategy and how this is an example of the flexibility of the three conventions, a completely opposite case will be studied in chapter 8, which represents a clear break with the international drug control regime: the legalization of consumption of drugs, mainly marijuana, for recreational purposes. Specifically, general aspects of the new policies implemented by Canada,

Uruguay and some states of the United States on legalization or, as Uruguay calls it, the "control of the sale" of cannabis will be analysed. This will allow to demonstrate that there is indeed a clear attempt by a certain number of countries to break with the IDCR. There is no doubt, especially within the CND and particularly with regard to the INCB, that the legalization of cannabis for recreational purposes is completely prohibited within the framework of the three conventions, there being no space to carry out a different reading as if it happened in the case of Portuguese strategies, especially because marijuana is included in the different lists of controlled substances.

A final concluding chapter, chapter 9, will reflect on the apparent inconsistencies identified. There is flexibility inside the regime, but it must always have a limit. In this case, the legalization of drugs for recreational purposes is clearly a limit of the current regime, and the application of strategies of this type, to maintain the international order, would have to go through a change or amendment of the main international instruments.

2. Historical Review

The debate regarding how to tackle the WDP is far from being something new, although in the last years it has increased due to the emergence of new positions, ideas and strategies. Countries have always tried to achieve a consensus, through either negotiations or imposition. The Three International Drug Control Conventions are still the best mandatory consensus that has been agreed on this topic, and all the consequential agreements, political declarations and plan of actions have been based on these international instruments. Nevertheless, the question has always been how to implement these conventions, and how flexible they are to elaborate new strategies to tackle the WDP.

But the history of drugs and how to tackle the WDP is very complex and generates many questions that need to be solved before understanding the processes that are taking place nowadays. For instance, when did the WDP became a problem? Drugs and narcotics have been used and have been legal longer than they have been subject of control of the international community. How and why was the international framework against drugs created? The Three International Drug Control Conventions are the minimum consensus that countries could achieve after they noticed that it was necessary to combine efforts to tackle the problem. How was the current policy against the WDP established? The War on Drugs, established in the seventies, is based in the international drug control conventions, but focuses mostly in some parts of these international instruments. The following chapter will seek to answer some of these questions to understand the development of the history of drugs and the combat against drugs.

2.1 The Opium Wars

It might seem a little bit arbitrary to start this historical review with the Opium Wars, considering that the history of drugs could be traced far beyond these events. Nevertheless, it is one of the first moments where there is a real interaction between States on an international level regarding the legal

framework for drug trafficking. Although this conflict was more about trade and economic issues rather than drug control policies, it established what was going to be not only the relation between China and the rest of the world for decades but also the “boom” of opium consumption worldwide.

2.1.1 First Opium War

The Opium Wars were two military conflicts between China and Great Britain that involved both countries in 1839-1842 and 1856. There are many reasons to explain the beginning of this conflict, but the most important ones were the economic impact for Great Britain and China of opium trade and the social impact of the Chinese people becoming addicted to opium⁵². When the trade route between China and Europe was established, Europeans were very attracted to the exotic goods produced by China such as silk and tea, while Chinese people were not as interested in the European goods. This situation, especially in a world dominated by mercantile rules, was very inconvenient for countries such as Great Britain, because the trade balance was completely unfavorable for Europe. It was necessary to find a popular good that could be sold in China to solve this situation, and the British found out that opium could be the solution. In the 19th century, the British were producing opium in India, and the British East India Company made a fortune selling opium to intermediaries who would sell the narcotic in the Chinese market. Julia Lovell explains this situation in a very passionate but accurate way. She states that

“in the early nineteenth century, unscrupulous British traders began forcing enormous quantities of Indian opium on Chinese consumers. When the Chinese government declared war on opium, to avert the moral, physical and financial disaster threatened by the empire’s growing drug habit, British warships bullied China out of tens of millions of dollars, and its economic and political independence”⁵³.

⁵² Frank Sanello and Travis Hans, *Opium Wars: The addiction of One Empire and the Corruption of Another*. (Sourcebooks, 2002)

⁵³ LOVELL, Julia. *The Opium War: Drugs, Dreams, and the Making of Modern China*. (Overlook Press 2011)

It is not clear if the Chinese really declared a war on opium, at least in the way President Richard Nixon did in the seventies. Although there was a huge debate in China in the first three decades of the 19th century about the legalization of opium, at the end this possibility was always rejected by the emperor. So, when the amount of opium that Great Britain was introducing into China increased, they tried to forbid the import of the narcotic into China and decided to use violence to do so. But the debate between the Chinese and the British regarding why the opium trade should be forbidden is what interests this research. Opium smoking, at that time, was not allowed in Great Britain, because of its harmful consequences for the society. But what happened abroad was a completely different story, and the economic interests, one more time, were at the end more important than the harmful consequences of drugs. This situation is very well explained in the letter sent by Lin Zexu, High Imperial Commissioner appointed by the Chinese Emperor to deal with the opium trade problem, to Queen Victoria. In his letter, he said that

“during the commercial intercourse which has existed so long, among the numerous foreign merchants resorting hither, are wheat and tares, good and bad; and of these latter are some, who, by means of introducing opium by stealth, have seduced our Chinese people, and caused every province of the land to overflow with that poison... Every native of the Inner Land who sells opium, as also all who smoke it, are alike adjudged to death. Were we then to go back and take up the crimes of the foreigners, who, by selling it for many years have induced dreadful calamity and robbed us of enormous wealth, and punish them with equal severity... We presume that you, the sovereign of your honorable nation, on pouring out your heart before the altar of eternal justice, cannot but command all foreigners with the deepest respect to reverence our laws! If we only lay clearly before your eyes, what is profitable and what is destructive, you will then know that the statutes of the heavenly dynasty cannot but be obeyed with fear and trembling! We have heard that in your own country opium is prohibited with the utmost strictness and severity: —this is a strong proof that you know full well how hurtful it is to mankind. Since then you do not permit it to injure your own country, you ought not to

*have the injurious drug transferred to another country, and above all others, how much less to the Inner Land! Of the products, which China exports to your foreign countries, there is not one which is not beneficial to mankind in some shape or other*⁵⁴.

It must be noted that it was one of the first times that the Chinese used officially the argument of morality and the importance of reducing harm among the society to try to stop drug trade and use. In fact, this is an argument that was going to appear several times in the upcoming decades, for instance in the United States in the beginning of the 20th century, and it is also an argument that countries keep using in the 21st century to try to maintain the current international drug control strategies. In addition, the Chinese Commissioner was using an argument that might have been more effective nowadays, considering the possibility of “shaming and framing” other countries decisions in the international system. But in a time when “hard power” and political realism was the principle that ruled international relations⁵⁵, and considering that Great Britain configured its Empire on the benefits of trade and political and geographical domination, the arguments presented to Queen Victoria were not enough to justify the actions taken by the Chinese Government to tackle the illegal opium trade. *“When free trade triumphed, opium smoking became a pathological problem. When free trade failed, gunboat diplomacy was applied”*⁵⁶.

Without waiting for an official answer from the British government, probably because there is no official record that the letter was ever received by the Queen of England, the Chinese decided to impose their laws in a way that finally led to disaster. While China was only punishing local traders, even with the death sentences (which curiously is still one of the most important

⁵⁴ Letter from Lin Zexu, high Imperial Commissioner appointed by the Chinese Emperor to deal with the opium trade problem, to Queen Victoria. Chinese Repository 8 (February 1840) 497-503. Reprinted in William H. McNeil and Mitsuko Iriye, eds., Modern Asia and Africa, Readings in World History Vol. 9, (Oxford University Press 1971), 111-118. Scanned by Jerome S. Arkenberg, Cal. State Fullerton. The text has been modernized by Prof. Arkenberg.

<<https://sourcebooks.fordham.edu/mod/1839lin2.asp>> accessed 19 December 2016

⁵⁵ Torbjørn Knutsen, *A history of international relations theory* (3rd edn, Manchester University Press 2016)

⁵⁶ Yangwen Zheng, *The Social Life of Opium in China*. (Cambridge University Press 2005) 87

aspects of the drug policies countries cannot agree with), the British did not care much. But when the trade of Opium was officially banned; the commercial exchange with Great Britain was limited to the port of Canton until the traders agreed to stop trading with opium (a policy that went against the interests of British traders who were not involved with opium); the “precursors” and goods of the foreign traders were confiscated; and especially after the opium loads of British ships were destroyed without any compensation; the Government had to interfere in order to protect its interests and the ones from their nationals.

It is not part of the purpose of this research to make a review of every single battle and event that occurred during the first opium war, but it is relevant to notice how in the first half of the nineteenth century the same interests that might concern Government nowadays were already a part of the international drug control debate: health and social interests, the type of punishment to drug related offenders, economic and commercial interests, the relevance of the role played by the private sector, etc. Probably the only thing missing was Civil Society as we understand it nowadays, although there was incipient public debate regarding the moral consequences of opium consumption among the society.

However, what interests the purpose of this research is that, as history has demonstrated several times, every time there is a prohibition of something extremely popular among the society, black markets flourish. One of the most important rules of economics is that when there is a huge demand of a good, there will be an offer. In addition, there were several people willing to risk going against the severe Chinese laws to continue profiting from the opium trade. This situation is a huge part of the current international drug control debate: demand control against supply control. Producer countries, mostly developing States, argue that while first world countries keep the consume high of the drugs they produce, the problem will not be solved. At the same time first world countries use a huge amount of resources in order cooperate with developing countries to fight against producers. Others, still a minority, argue that there must be a control of the offer rather than a

prohibition, to eliminate illegal markets. Obviously, during the first half of the nineteenth century, there were no official talks among States regarding the importance of establishing international control policies. The letter sent to Queen Victoria by Commissioner Lin is probably the closest example we can find on that. However, as it has already been established, in a system ruled by political realism, the strongest army was the best way to impose States interests, or, with other words, forcing what was going to be the consensus on the matter.

The first opium war culminated with the Treaty of Nanjing, through which the representatives of the British Empire and the ruling Chinese dynasty established 13 articles of obligatory compliance. Among the main obligations China had to assume was to pay both war and commercial reparations to the British Empire, to free all the prisoners of war and give amnesty to the Chinese citizens who had supported the British cause. For their part, the British fundamentally undertook to withdraw their military presence once the first payments were made.

However, and considering that the Nanking treaty was considered too general, China and the British Empire subsequently subscribed the treaty of the Bogue in 1843⁵⁷, which sought to establish more specific elements on trade regulations between the two countries. Elements such as the possibility that the British could acquire property in Chinese ports revolutionized the bilateral relationship and reconfigured the opening of China to the world, which had been limited. However, neither this treaty nor Nanking's managed to close all pending issues between the British and the Chinese, mainly regarding the opium trade, which left unresolved situations that led to a new military confrontation.⁵⁸

Undoubtedly, the most relevant event of the end of the first Opium War was the perpetual cession of the island of Hong Kong, which shows, in general

⁵⁷ Harris Gelber, *Opium, soldiers and evangelicals Britain's 1840-42 war with China, and its aftermath*. (Palgrave Macmillan 2004) 120-132

⁵⁸ Phil Chan, 'China's Approaches to International Law since the Opium War'. (2014) 27(4) LJIL 859

terms, why the Opium Wars make up a large part of the system international during the next two centuries.

2.1.2 Second Opium War

The second Opium War started in 1856 and ended up in 1858 with the signature of the Treaty of Tientsin⁵⁹. The trigger of the conflict is known as the "arrow incident", which consisted in the boarding by Chinese authorities of the ship "Arrow", which was being accused of piracy and contraband. Although the ship was originally owned by Chinese owners, it had been registered in the port of Hong Kong, which, as already mentioned, passed into British control after the first opium war. Although the Arrow was manned by Chinese citizens and that the owners had the same nationality, the English justification was that the ship was under British flag, which meant an insult on the part of the Chinese Government for which they refused to apologize.

However, and per what Yunqiu Zhang pointed out, *the factors that led to this war included issues of control over Guangzhou, disputes over British diplomatic representation in the Chinese capital and over the revision of the Treaty of Nanjing (1842), (...) and the murder of a French Catholic missionary. Fundamentally, however, it was the differences between China and the West in their perceptions of international relations that underlay the outbreak of the war*⁶⁰

Although the motives that gave rise to the war are diverse, the assassination of a French missionary, which became known as the "Auguste Chapdelaine incident", caused the French to go on to support the British militarily. Additionally, there were various attempts to incorporate Russia and the United States into the alliance against China, considering that these countries had important economic interests in relation to the Opium trade.

⁵⁹ Chris Feige and Jeffrey Miron, 'The opium wars, opium legalization and opium consumption in China'. (2014) 15(12) AEL 911

⁶⁰ Yunqiu Zhang, *Second Opium War*. (Salem Press Encyclopedia 2013) 3

However, even though Russia and the United States trusted in the defeat of China, they did not participate in the conflict in military terms.

The second war of the opium was based fundamentally on the control of Guangzhou, city to which the British would have access to the stipulated by the Treaty of Nanjing, but in which in practice they could not be established due to the rejection of the local population. It is noteworthy that, militarily, the invasion and bombing of Guangzhou did not obtain greater resistance from China, a country that at that time was immersed in internal military conflicts.

As indicated above, it is not the objective of this investigation to make a recount of the most important military campaigns of the opium wars, but to understand what their consequences were regarding future international discussions on how to approach the issue of trafficking and consumption of drugs. The second opium war ends partly with the agreements of Tianjin, which, with the participation of the British Empire, France, the United States and the Russian Empire, sought to force China to open to the world. Among the main consequences of the Tianjin agreements are the opening of new Chinese ports for international trade, the opening of diplomatic legations of foreign powers in Beijing, which was closed to foreigners, and especially, the legalization of the Opium trade. Subsequently, there were militant conflicts framed in the non-compliance by China of commitments related to these agreements, which already escape from what specifically concerns the drug trade.

It is very interesting to note that the moral debate over drug trade and consumption intensifies during the opium wars. It could be argued that the moral and public health motives for which China sought to suppress the opium trade could have been excuses for diminishing the foreign presence in its territory. However, the moral and public health issue was not only argued by China, but also by British missionaries who had noticed the harmful effect on the population.

The debate in favour or against the Opium War centred on the question of whether the opium trade itself was immoral.

(...) In this context, the British opium merchants and their supporters emphasized that the Chinese had tolerated the opium trade for years. Their attempt to finally suppress it was therefore portrayed as a treacherous and hypocritical act, showing the degraded nature of the Chinese culture as such. (...) At the same time, missionary influence meant that the morality of the opium trade was increasingly discussed, even before the crisis in 1839. Walter Medhurst decried the destructive effects of the drug on the Chinese population. He drew his information from his experience in Southeast Asia and one trip up to the China coast and vividly described the harm inflicted by Opium on the Chinese⁶¹.

During the nineteenth century, however, it is difficult to imagine that an empire like the British based its decisions on international policy based on "moral" reasons, especially when its population was not morally affected. Additionally, it was necessary to protect its opium traders as well as the investments made. Clearly, improving relations with China was not a priority for the British Government, although it was not a priority for China, a country that in most cases preferred to remain as isolated as possible from Western influence. However, the opium trade was not the only economic opportunity in Chinese territory.

In A.S. Thelwall's publication, we can see evangelical zeal combined with the interests of those merchants unhappy with the competition in the China trade through the opium smugglers. He described the destructive effects of the drug strongly. The main thrust of his publication was to reach a parliamentary decision against the British opium trade, arguing that this decision would open China for the trade with other British goods⁶².

While in military terms the opium wars culminated with the victory of the British over the Chinese, which brought a commercial opening never seen before between the Western world and Asia, as well as a territorial reconfiguration that would have consequences until the end of the 20th century considering the status of Taiwan, what is relevant to the present research is that the moral debate regarding policies that should be applied

⁶¹ Ulrike Hillermann, *Asian Empire and British Knowledge*. (Palgrave Macmillan 2009) 184

⁶² Ulrike Hillermann, *Asian Empire and British Knowledge*. (Palgrave Macmillan 2009) 185

to address the issue of drugs started⁶³. During the coming years, the moral issue would increase its relevance, so much so that it was included in the text of the three international conventions on the control of narcotic drugs. In that sense, it is necessary to continue to reconstruct in a general way the history of drugs in the international context until the establishment of the current regime.

2.2 Drug consumption as an international problem

After the end of the opium wars, the international debate in relation to drugs and narcotics was focused on how to regulate their trade and trafficking. In short, the first great battle about trying to control consumption was lost. However, during the nineteenth century, the moral question about drug consumption was once again present in the national and international debate, led mainly by changes in the domestic situation in the United States and Europe.

People have been using drugs since they started to understand that plants could be used for different motives, such as ceremonial, recreational, medical, among others. Incas in the Andes used coca leaves as an ancient “Red Bull”⁶⁴, even though they did not have the knowledge to produce cocaine. In the same line, it is well recorded that the ancient Chinese used cannabis for medical purposes far before it was popularized by the “Rastafari culture”⁶⁵. In the case of the United States, during the colonial time and even after independence, the use of some drugs for recreational purposes was legal and very popular all around the country⁶⁶. On the one hand, Sigmund Freud stated that cocaine was a very good option as anaesthetic and stimulant, while cocaine was offered in specialized shops in the United States due to its high demand among the society, and it is

⁶³ Mazyar Ghiabi, ‘Spirit and being: interdisciplinary reflections on drugs across history and politics’ (2018) 39(2) TWQ (207)

⁶⁴ Douglas Gifford, Pauline Hoggarth and Aurelio Flores, *Carnival and coca leaf: some traditions of the Peruvian Quechua Ayllu* (Scottish Academic Press 1976)

⁶⁵ Frank Dikötter, Lars Laaman and Zhou Xun, *Narcotic Culture, A History of Drugs in China* (Hurst and Company 2004)

⁶⁶ Wayne Morgan, *Drugs in America: a social History* (Syracuse University Press 1981)29-44.

believed that even former President Ulysses Grant used cocaine to live longer while he was writing his memoirs.⁶⁷ On the other hand, several companies started selling very popular products that contained either cocaine or coca leaf, such as the Coca Cola Company. Another product which enjoyed high demand not only in the United States but also in Europe, including members of different royal houses, was Vin Mariani, which consisted of a mixture of wine and cocaine.⁶⁸

If drugs were a big part of the lifestyle in the 19th century, when did it actually become a problem that had to be treated on an international level? The first motives were not necessarily socioeconomic or related to health but were “moral”, especially in the beginnings of the 20th century. As Morgan Wayne said, *“personal actions that seemed to affect social institutions or stability faced the test of popular opinion. What people did as individuals now affected others in ways undreamed of only a generation before. A powerful urge to purify American life thus accompanied reforms in business and politics. This involved struggles against prostitution, alcohol and drugs as much as it did efforts to improve the lot of women, children and the poor”*. It is very interesting to notice that the idea to associate the importance to fight against the World Drug Problem with moral issues is still included in the legal framework of the international cooperation against drugs. The Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol, recognizes in its preamble *“that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind”*⁶⁹.

It was only after society started noting the effects of drug addiction that *“politicians, religious leaders, pharmacists, doctors, and journalists spoke out for tighter controls on drug use”*⁷⁰ This is also because various theories began to appear that indicated that drugs were a cause of decadence. The clear example of this situation continued to be China, which in previous

⁶⁷ Wayne Morgan, *Drugs in America: a social History* (Syracuse University Press 1981)16

⁶⁸ Paul Gootenberg. *Cocaine: Global Histories*. (Routledge, 1999) 25-43

⁶⁹ Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol (adopted 25 March 1961) 23

⁷⁰ Ron Chepesiuk, *The War on Drugs: An International Encyclopedia*. (ABC-CLIO 1999).

centuries had shone with great splendour and that at the end of the 19th century was subject by the Western powers. Likewise, the use of opium and, later, of other narcotics, began to be associated with poverty, even though certain products with cocaine content continued to be commercialized among the upper classes. However, there was a difference between the one who consumed narcotics for recreational purposes, mainly the upper class, and those who became addicted to stimulants, who were considered weak people.

But even this moral debate had its flaws, since what could be negative for some was not necessarily for others. Just as the moral question began to take on increasing importance, economic and commercial issues did not cease to be so. In other words, telling the East India Company to stop trading opium for moral reasons would be like telling the Colombian cartels today to stop doing so. A clear example was the establishment by the United Kingdom of The Royal Commission on Opium, which was created precisely by the increasing pressure in London to ban the opium trade. However, in 1895 the commission determined the following:

As the result of a searching inquiry, and upon a deliberate review of the copious evidence submitted to us, we feel bound to express our conviction that the movement in England in favor of active interference on the part of the Imperial Parliament for the suppression of the opium habit in India, has proceeded from an exaggerated impression as to the nature and extent of the evil to be controlled. The gloomy descriptions presented to British audiences of extensive moral and physical degradation by opium, have not been accepted by witnesses representing the people of India, nor by those most responsible for the government of the country⁷¹.

Despite these facts, what is relevant for this research is to point out how the international debate in relation to drugs began to focus on different aspects and on the need to regulate them in some way. These debates began to shape the first agreements and binding documents

⁷¹ John Richards. 'Opium and the British Indian Empire: The Royal Commission of 1895'. (2002) 36(2) MAS 378

that would later derive into the Three International Drug Control Conventions.

2.3 The building of the current International Drug Control Regime

As it has been stated before, the current IDCR is based on the Three International Drug Control Conventions, which constitute its cornerstone. And to emphasize that it is “the current regime” is not random, considering, as it was shown during the historical review, that States have implemented many regimes since they first attempted to control drug trafficking. Although the International Community is constantly developing new documents and strategies to deal with this problem, it is safe to say that, in most cases and both in the national and international level, they are based in the three conventions.

Based on the idea of the evolution of the drug control regimes, the current one, although still preferred and defended by most of Member States, is not fixed and immutable. States tried during the 18th and 19th centuries to regulate the trafficking more than they tried to forbid it. However, when did they start talking more about control and, thus, creating the current regime? As we have seen, during the 19th century consumption of cocaine and opioids in general was legal. Per Letizia Paoli, Victoria A. Greenfield and Peter Reuter, this was mostly because there was a “*limited range of opiates that were technologically available*”.⁷² But when the Chinese market started to grow, and new uses and substances for the opioids were discovered not only for medical purposes but specially for recreational ones, the concern about the health problems raised. This, together with the political and “moral concerns” that have already been presented, forced States to create more national and international regulations and prohibitions.

This regulations and prohibitions match with a decrease of the international market at least until 1960, time during an increasingly prohibitionist regime raised mostly because of the pressure of western countries. The

⁷² Letizia Paoli, Victoria Greenfield and Peter Reuter. ‘Change is Possible: The History of the IDCR and Implications for Future Policymaking’. (2012) 47(8-9) SUM 923.

International Opium Commission is probably the first step towards the creation of the current regime. The Commission, proposed by the United States, was convened in 1909 in Shanghai with the participation of the Austro-Hungarian Empire, China, France, Germany, Great Britain, Italy, Japan, The Netherlands, Persia, Portugal, Russia, and Siam. It is very interesting to notice that one of their first agreements was a fundamental guideline to decision-making process of the drug control regime in the upcoming future: every agreement had to be taken by consensus. As Hamilton Wright stated about the commission, "*its organization, its rules of procedure, the spirit in which it attacked its problem, avoided a majority and minority report, and declared unanimously, establish a precedent for the guidance of all future Commissions of Inquiry.*"⁷³ The commission, although did not intend to establish a binding agreement, decided, among others, two major points that are an essential part of today's regime: that it was necessary to suppress gradually the smoking of opium, while recognizing that every state had the right of using opiates for medical purposes.

The meeting in Shanghai was the cornerstone for the first international binding instrument for drug control: The Hague International Opium Convention of 1912.⁷⁴ Although most of the ideas discussed in Shanghai were included in this convention, there was no clear mechanism regarding how the provisions of the treaty were going to be implemented. Nevertheless, one of the most innovative aspects of this convention was that, in addition to narcotics that were already under international discussion such as morphine and opium, the convention attempted also to regulate two substances that, although were not necessarily new, were becoming a problem: heroin and cocaine. This fact was fought by Germany, country where cocaine was first produced by German chemist Albert Niemann, who was the first one to isolate and extract the "*psychoactive ingredient from coca leaves. He named the raw, purified ingredient cocaine and earned his doctorate degree by writing about its properties*"⁷⁵. Germany was hoping to

⁷³ Hamilton Wright, 'The International Opium Commission'. (2012) 3(3) AJIL 648

⁷⁴ Ron Chepesiuk. *The War on Drugs: An International Encyclopedia*. (ABC-CLIO 1999). 89

⁷⁵ Justin Garcia, *Cocaine*. (Salem Press Encyclopedia of Health 2015) 3

delay the control of cocaine as much as possible, so it was agreed that universal ratification of the treaty was needed before entering force.

However, the United States continued to promote its policies both nationally and internationally. In internal matters, the "Harrison Act" was established, which obliged every person who sold drugs to be licensed and keep a record of all the drugs that were sold, which led to a stricter control regime for the drugs that were directed to medical use⁷⁶.

All States that took part in the meeting of the Opium Commission signed the treaty of The Hague. Nevertheless, in 1915, it had been ratified only by China, the Netherlands and the United States. Because of the condition of universality defended by Germany, which established that the Treaty was going to enter into force only after the Government of the Netherlands, as depositary of the treaty, notified that all existing powers had signed and ratified the treaty, it is possible that the convention might have never entered into force.⁷⁷ However, after the end of World War One, and mostly because of pressure by the United States and Great Britain, almost 60 countries signed and ratified the treaty after having been included in the peace treaties.⁷⁸ Although the treaty was the first international binding instrument on the matter of drug control, it is important to notice that it called upon more about the establishment of national control policies and regulations rather than to an international coordinated action. For example, the production of

⁷⁶ Audrey Redford and Benjamin Powell, 'Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914'. (2016) 20(4) Independent Review 509, 510-514

⁷⁷ International Opium Convention. (adopted 19 February 1925)

Article 22 of the International Opium Convention established that Government of the Netherlands was going to invite all powers not represented in the conference to sign the convention. Article 23 stated that *"as soon as the ratifications of all the signatory Powers, as well on their own behalf as on behalf of their colonies, possessions, protectorates, and leased territories, have been received by the Government of the Netherlands, the latter will notify all the Powers who have ratified the convention of the date on which it received the last instrument of ratification"*. Article 24 established that the convention was going to enter into force three months after the notification mentioned in article 23.

⁷⁸ United Nations Office on Drugs and Crime. 'Chronology: 100 years of drug control' (UNODC, 2008) <https://www.unodc.org/documents/wdr/WDR_2008/timeline_E_PRINT.pdf> accessed 18 March 2017

opium was not forbidden, but it was established that opium could not be exported to countries that prohibited it.

The establishment of the League of Nations in 1919 was also a milestone for the IDCR, considering it became the organization in charge of the drug control, a function that would later be inherited by the United Nations through the ECOSOC and the CND. Although the United States was not part of the League of Nations, its influence regarding the WDP remained very strong, and this country continued promoting agreements on the international level.

One of the most important aspects that must be mentioned is that the regime that was created in the first part of the 20th century focused indeed more on supply, and not even supply reduction but only supply control. For example, the International Opium Convention of 1925 approved in Geneva established, *an import-certification system to limit the quantity of drugs each country could legally import*. In the same line, the Geneva 1931 Limitation Convention restricted, among others, *the manufacture of opiates and other drugs to the amounts necessary to meet medical and scientific needs: countries would provide estimates of need and a new agency would monitor them*.^{79,80} The people currently advocating for the need to change the current IDCR argue that the regime cannot focus only in supply reduction and that it should be not as punitive as it is. But although the international instruments that have just been presented were the cornerstone of the current IDCR, it would be unfair to state that it was the only source.

⁷⁹ Letizia Paoli, Victoria Greenfield and Peter Reuter. 'Change is Possible: The History of the IDCR and Implications for Future Policymaking'. (2012) 47(8-9) SUM 926.

⁸⁰ Although Paoli, Greenfield and Reuter believe that *the effectiveness of the convention was seriously undermined by several loopholes for manufacturing states and by Article 26, which absolved states of any responsibility under the convention for their colonies*, it is interesting to notice that states providing estimates of need of control substances is one of the main objectives of the current IDCR related to international cooperation, being the INCB the agency in charge of the monitoring.

2.3.1 The establishment of the Three International Drug Control Conventions

The international documents that were approved in the first half of the 20th century, driven mainly by the United States and largely adopted by China, almost as a kind of vindication of the policies that promoted since the eighteenth century and that gave rise to wars of opium, began the construction of a more restrictive regime, overcoming the economic and commercial interests of the powers that had been dedicated to the opium trade and had obtained great benefits from this activity.

*Opiate consumption had been falling in the United States before 1914, reflecting state-level restrictions, changes in the beliefs of medical practitioners about the dangers of opiates, and growing media and public concerns about the spread of nonmedical addiction that involved younger and poorer males*⁸¹. However, there is no clarity as to whether this decrease is due to the restrictive policies applied in the United States. This decrease in the consumption of narcotics, mainly opium, also occurred in different countries of the world, such as China and Great Britain. Specifically, Great Britain banned the consumption of opium in 1942 in all its colonies in Asia, except for India which, as already mentioned, continued to represent an important market for British trade and there was a very strong lobby to prevent this market to close. In 1950, France ended the legal distribution of opium in its colony in Indochina in 1950, while other countries in Asia such as Indonesia and Thailand banned opium consumption in the 50s as well. These policies did not mean that the supply of opium disappeared. As expected, the ban led to the flowering of illegal opium markets, which began to be persecuted very hard.

Within this framework, there was a perception that restrictive policies were working, although there are those who point out, like David Courtwright, that the decrease in consumption and commercialization was not due to

⁸¹ Letizia Paoli, Victoria Greenfield and Peter Reuter. 'Change is Possible: The History of the IDCR and Implications for Future Policymaking'. (2012) 47(8-9) SUM 928

restrictive policies but to a change in the conception of the use of opium both in the people who used it and in the doctors who prescribed it⁸².

As mentioned, the post-war period brought with it a boom in international instruments considered "restrictive". Several agreements had already entered into force after the first World War because they were included in the peace treaties. But after the second World War, these agreements were implemented in a very hard way. For example, the Communist Party's rise in China also led to a worsening of the anti-drug policies, many of which continue in the Asian country until the present day⁸³. The opium suppression campaign that started in China under the Communist Party command reached approximately 80,000 arrests of drug traffickers of which 30,000 were sent to prison and 880 were sentenced to death. In addition, users received forced rehabilitation treatments⁸⁴.

It is difficult to determine exactly when the current IDCR was born. However, the end of the Second World War marked a new milestone in this respect with the establishment of the United Nations and the creation of ECOSOC, both events that took place in 1945.

“ECOSOC, one of the six main organs of the United Nations established by the UN Charter, is the principal body for coordination, policy review, policy dialogue and recommendations on economic, social and environmental issues, as well as for implementation of the internationally agreed development goals. ECOSOC serves as the central mechanism for the activities of the United Nations system and its specialized agencies, and supervises the subsidiary and expert bodies in the economic, social and environmental fields”⁸⁵.

⁸² David Courtwright, *Dark Paradise: A history of Opiate Addiction in America*. (Harvard University Press 1982).

⁸³ Waseem Ahmad Qureshi, 'The Manufacturing and Trafficking of Narcotics: An Overview of Global Laws' (2016) 50 (4) JMLR 813

⁸⁴ Yongming Zhou . 'Nationalism, identity and state building: the anti drug crusade in the People's Republic, 1949–1952'. In Timothy Brook and Bob Tadashi Wakabayashi (Eds.), *Opium regimes: China, Britain and Japan, 1839–1952* (University of California Press 2000)

⁸⁵ United Nations Economic and Social Council, 'About Ecosoc' <<http://www.un.org/en/ecosoc/about/>> accessed 19 July 2018

Subsequently, the ECOSOC established the CND in 1946, with the objective of supervising the application of international drug control treaties. In accordance with the resolution that gave life to the CND, the ECOSOC established the commission *“in order to provide machinery whereby full effect may be given to the international conventions relating to narcotic drugs, and to provide for continuous review of and progress in the international control of such drugs”*⁸⁶.

The specific functions of the CND in relation to the current IDCR based on the three conventions will be analysed in greater depth in subsequent chapters. However, it is particularly important to note that the CND was established before the Single Convention of 1961, which based its actions on previous agreements, many of them negotiated even 30 years before the establishment of the CND. In short, the establishment of the CND can be understood as a consequence of the previous regime and a cause of the current regime.

After the creation of the CND, the first major step that the international community took to try to control the trade and cultivation of narcotics, mainly opium, was the United Nations Opium Conference in 1953. However, it is difficult to say whether it was successful, considering that only 35 States were represented and 8 attended as observers. The fundamental objective of this conference was, as the then Secretary General of the United Nations, Dag Hammarskjöld, pointed out, *“to try to solve the problem of drug addiction and to strengthen present controls which are incomplete as regards opium and poppy straw”*. However, this conference was not convened on the margins of the CND, even though it responded to a resolution of the ECOSOC.

Notwithstanding the initiative initiated in 1953, this agreement never came into force. In 1961, the General Assembly of the United Nations approved the Single Convention on Narcotic Drugs, which owes its name to the fact that it replaced all agreements reached previously, especially regarding

⁸⁶ Economic and Social Council ‘Establishment of a Commission on Narcotic Drugs’ (16 FEB 1946) ECOSOC Doc 9/I

opium. However, the Single Convention went for the first time further from the opium focus and included regulations to control also other plants used as raw material for the manufacture of narcotics such as coca leaf and cannabis.

The exact scope of the 1961 Single Convention will be addressed in later chapters of this investigation. However, it should be noted that this Convention was and continues to be probably one of the most restrictive of those that make up the current IDCR. Likewise, this was the convention that gave birth to the INCB, an institution that, as will be explained in more detail later, was born to serve as the "watchdog" of the IDCR. The Single Convention of 1961 was subsequently amended in 1972, among others, to align it with the novelties introduced in the 1971 convention. The scope of the amendment included the possibility of using alternative or complementary measures to the imprisonment. It also strengthened the role of INCB in the fight against the illicit traffic in narcotic drugs.

The negotiation of the 1971 convention, curiously, included positions completely different from those presented to negotiate the 1961 single convention. As has been seen during the historical review of this investigation, the regime of strict control of cannabis, opium and coca leaf was promoted by the developed countries that wanted to establish greater security measures on the crops that were found mainly in the developing countries. However, the 1971 convention faced strong lobbying from pharmaceutical companies in developed countries, which feared that control measures on substances that had not been included in the 1961 convention would result in economic losses.

One group included mostly developed nations with powerful pharmaceutical industries and active psychotropic markets; this was essentially the manufacturing group. The other group consisted of developing States, supported by the socialist countries, with few psychotropic manufacturing facilities; this was the "organic group." At the 1971 negotiations, however, the positions of the two groups were completely reversed. The manufacturing group adopted the traditional arguments of the organic group: weak controls, national as opposed to international

*controls, and national sovereignty taking precedence over any supranational UN body. The rationale for these positions was that strict controls would be difficult to enforce and would cause financial loss. The organic group, on the other hand, pushed hard for strict controls like those it had been forced to accept in the Single Convention*⁸⁷.

In this sense, and considering what is contained in the 1971 and 1961 conventions, the regime does not allow the cultivation of plants that can be subsequently used to manufacture drugs for recreational purposes, while only controls the psychoactive substances produced in laboratories

Finally, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 culminates with the consolidation of the current IDCR. As its name clearly indicates, the primary objective of this document was to serve as a legal instrument to suppress the illicit traffic in narcotic drugs worldwide. Although the two previous conventions also covered the subject of illicit trafficking, the 1988 convention deepens this issue, giving greater force to the States to continue with what was called the "War on Drugs". The War on Drugs through international law became legal if not current through the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Drugs, done in Vienna in December 1988⁸⁸.

This convention continued the same line as that approved in 1971 and the protocol of amendment to the 1961 convention in relation to allowing alternatives or additions to imprisonment around drug-related offenses. And in this lies a fundamental part of the essence of the flexibility of the three conventions, given that these grant possibilities to the States on what penalties to apply. The fact that many States have decided to apply restrictive measures that led them to fight the "War on Drugs", does not imply that the conventions do not grant other possibilities to the States.

⁸⁷ Senate of Canada Special Committee on Illegal Drugs. *Cannabis: Our position for a Canadian Public Policy*. (Volume III, Part IV and Conclusions).
<https://web.archive.org/web/20021117164232/http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/rep-e/repfinalvol3-e.htm#_ftn69> accessed 23 January 2018.

⁸⁸ Neil Boister, 'Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances UN Publication' (2001) 50(2) ICLQ 466, 469

2.4 The War on Drugs

Even before President Richard Nixon declared the “War on Drugs” in the seventies, establishing the strategy that was going to be followed and, in some way, accepted worldwide until some States and non-State actors started claiming that the war was lost, the IDCR was characterized, fundamentally during the 20th century, by the application of harsh policies against illicit drug trafficking at all levels. In that sense, when President Nixon pointed out in 1971 that drug abuse was the number one enemy of the United States and undertook the so-called “War on Drugs,” it can be said that he established a terminology for a process that had already been developing many years ago, although it was radicalized from that moment.

President Nixon thought that the policies against drugs and especially drug cartels had to be stronger than ever, considering the amount of United States Citizens that started consuming narcotics such as heroin, cocaine and marihuana⁸⁹. Therefore, through international cooperation and economic aid, he imposed his point of view. However, even though the policies established by Nixon called upon a strong response against illegal drug trafficking, the Drug Abuse and Treatment Act of 1972 included the importance of balancing the law enforcement strategies with prevention, education, treatment and rehabilitation programs⁹⁰. Although it is true that the amount of money and resources given to these areas has not been as nearly as considerable as the resources directed to law enforcement, it must be noticed that the importance to approach both issues was, once more, established, as it is also established in the Three International Drug Control Conventions and consequential agreements. Therefore, once more we see that the debate was focused on how to correctly implement the policies that had already been established several times.

⁸⁹ Elaine Sharp, *The Dilemma of Drug Policy in the United States*. (Harper Collins College Publishers 1994)

⁹⁰ The American Presidency Project, ‘President Richard Nixon Statement About the Drug Abuse office and Treatment Act of 1972’. <http://www.presidency.ucsb.edu/ws/?pid=3782> accessed 29 March 2018

Illegal Drug Trafficking, production and Drug Cartels have demonstrated to be very adaptable to new circumstances and challenges, so President Nixon tried to adapt the strategies to tackle the WDP to these new circumstances. The only way this can happen is if the legal international framework is flexible enough to give States enough tools to develop innovative ways to tackle the problem. This is a principle that probably was not considered in Nixon's policies. He did have some successes when he started his War on Drugs, especially against Colombian cartels and the opium production in the Asian Golden Triangle, which was very important as raw material to produce heroin. The Nixon administration started to work very closely with the Colombian Government to fight against the cartels, and, in the case of Asia, the US Government invested in convincing farmers to change to alternative crops, which was a first step to the Alternative Development Programs that were going to be implemented in the future. But this did not last long, and while the though Nixon strategies remained the same, the illegal drug production diversified and found new markets and products⁹¹.

The War on Drugs, both in the United States and internationally, was based mainly on the adoption of very strict laws prohibiting the use of drugs. It sought to attack the abuse of narcotics giving priority to the law enforcers interventions. In short, it could be determined that for a long time the War on Drugs viewed the addict as part of the criminal chain, not as a victim, contrary to the vision we have today⁹². It is necessary to point out that this vision is consistent with the provisions of the three international conventions, especially the 1961 convention. However, although the aforementioned documents allow the addict to be criminalized, they do not oblige.

At the international level, the war against drugs was not only promoted but sought to be imposed. A clear case of this was the invasion of Panama by

⁹¹ Duane Olson, *Nixon's War on Drugs: The Daddy Rabbit of Frauds*. (Strategic Book Publishing & Rights Agency 2013)

⁹² Paul Kinfelman, 'The second Casualty of War: Civil Liberties and The War on Drugs' (1992) 66(4) SCLR 1389

the United States Army in 1989, which aimed to overthrow and capture General Manuel Antonio Noriega, the de facto ruler of that country, who was required by the US justice system to be charged with the crime of drug trafficking.

The War on Drugs has not been fought in the same way in all countries. Although the Western Hemisphere was aligned with the policies of the United States in relation to the establishment of repressive measures, especially since 1970, the same amount of resources was not invested in all countries, nor was the level of third-party interventions reached. The case of Panama that has been mentioned, of course, is extreme, and could even be debated if the issue of drugs only served as an excuse for the United States to invade a country that is geopolitically necessary for their interests, mainly due to the control of the Panama Canal.

Likewise, even the European countries that traditionally supported the policies of the United States more began to question such strategies in the 1990s, as in the case of the Netherlands and Portugal. They, like other European countries, began to tolerate consumption with greater flexibility, without getting to legalize it at the beginning, given that this step was taken by Portugal almost at the end of the 90s, becoming a pioneer country in that sense as it will be analysed in later chapters.

Interestingly, the countries that for the longest time maintained and even keep maintaining the War on Drugs at levels like those of Nixon in the 70s are the countries of Asia and to a lesser extent of Africa, not to mention Russia. For example, the case of the Philippines, through the policies of President Duterte, are the most emblematic. The case of the Philippines, although it will not be analysed in depth in the present investigation, is a clear example of policies framed in the "War on Drugs" that go beyond the scope of the three international conventions, given that although it could be said that they are characterized by law enforcement and a fight against production and consumption, they have been tainted by human rights violations, which is not allowed within the current IDCR.

2.4.1 The result of the War on Drugs

As it has been observed, the war against drugs was the consequence not only of what was established in the three international drug trafficking conventions but also of the evolution of the fight against drugs since just before the beginning of the 20th century. There was a consensus on the "immorality" of drugs and all the evil that was done to the human being. There was a huge stigma in relation to the drug addict who, while he could be cured, was not the priority. The priority was the eradication of supply at all levels, from production to trafficking. And it was considered in many situations that penalizing the purchase and consumption would help by logical consequence to reduce the supply. Today there are many who clearly point out that this strategy has failed at almost every level.

Regarding the outcome of this War on Drugs, the data provided by UNODC each year are quite clear: the international community continues to be equal to or farther from winning this war than it was in the 60s, 70s and 80s, decades in which the Three International Drug Control Conventions were established. Illicit trafficking of opium and cannabis crops has remained stable and, in many countries, has grown. The number of people who use drugs for recreational purposes has also been maintained, while there is a clear increase among consumers of the so-called "new psychoactive substances". In short, the problem has not only disappeared, but has evolved into new forms that require new responses from States and relevant international organizations. It is true that the strategies applied by the different States have had specific successes, such as the reduction of illicit crops in Thailand and Peru through the application of "alternative development" programs. However, in holistic terms, the War on Drugs has not been successful in achieving its main objective: to achieve a society free of drug abuse.

The outcome of this War on Drugs should not be analysed only in relation to production and supply, but to the impact it has had on the drug dependent. In the first place, it is worth mentioning that the main users of drugs are, fundamentally, the most vulnerable people in society, especially

the poorest segments. As Liza Ayuso points out, drugs and poverty have an inseparable connection. Drugs can lead some to poverty, lift others out of poverty (clearly referring to traffickers and cartels) and make many forget their poverty⁹³. In that sense, among many academics there is the notion that the War on Drugs, as well as the restrictive and punitive policies that derive from it, have marginalized citizens of the poorer social classes, and that said marginalization has increased the use of drugs. and drug abuse.

Another issue that needs to be mentioned in relation to the results of the War on Drugs is did not focus enough on the objective to guarantee access to controlled substances for medical and scientific purposes. International conventions allow the production of both coca leaf, cannabis and opium for medical or scientific purposes. Likewise, they establish control mechanisms for psychoactive and psychotropic substances produced in pharmaceutical companies⁹⁴. However, IDCR has focused so much on controlling production that it has not invested enough resources to guarantee access to controlled substances for medical purposes, mainly in developing countries. The control systems implemented by the INCB and, in general, by the producing States, as well as the restrictive prices of these products, have prevented the control systems from fulfilling the function for which they were created: preventing the diversion of controlled substances. The current system, in one way or another, has promoted that only people with sufficient resources can access substances necessary for the treatment of diseases, often obtaining them directly from third countries since in theirs these are not available. Especially the importance of improving access to palliative pain opioids is a topic that INCB and UNODC mention each year in their respective reports.

The pursuit of a militarized and enforcement-led global 'War on Drugs' strategy has produced enormous negative outcomes and collateral damage. These

⁹³ Liza Monica Ayuso Quiñones. 'La guerra contra las drogas, guerra contra los pobres: Aspectos Socioeconómicos de la Políticas Pública'. (2006) 75 (4) Revista Jurídica Universidad de Puerto Rico 1411

⁹⁴ Jason Nickerson, Katherine Pettus and Kathleen Wheeler, 'Access to controlled medicines for anesthesia and surgical care in low-income countries: a narrative review of international drug control systems and policies' (2017) 64(3) Canadian Journal of Anesthesia (296)

include mass incarceration in the US, highly repressive policies in Asia, vast corruption and political destabilization in Afghanistan and West Africa, immense violence in Latin America, an HIV epidemic in Russia, an acute global shortage of pain medication and the propagation of systematic human rights abuses around the world.

The strategy has failed based on its own terms. Evidence shows that drug prices have been declining while purity has been increasing. This has been despite drastic increases in global enforcement spending. Continuing to spend vast resources on punitive enforcement-led policies, generally at the expense of proven public health policies, can no longer be justified⁹⁵.

However, one aspect that could be considered essential to understand the different approaches that exist in relation to the "War on Drugs" is that there is no international consensus regarding what this means. The War on Drugs has long been associated with violence and the application of punitive measures. However, the objective of this War on Drugs, finally, should be the same that has been established in the Political Declaration of 2009 and the resulting document of UNGASS 2016: to achieve a society free of drug abuse.

If we consider that "winning the War on Drugs" implies having a society free of drug abuse, which does not mean the same than drug-free society, then it is possible to continue fighting this war through different strategies that do not necessarily imply violence in all cases. In that sense, it is possible to say that the War on Drugs has not been lost but that a rethinking of the strategies is necessary. Going a step further, it could be said that States such as Portugal, as will be seen in later chapters, are winning their own "War on Drugs". However, from the moment that certain States, those who defend the need to change the IDCR, give up their efforts of achieving a

⁹⁵ LSE Expert Group on the Economics of Drug Policy, 'Ending the Drug Wars' (LSE Expert Group on the Economics of Drug Policy, 2014)
<http://eprints.lse.ac.uk/56706/1/Ending_the%20_drug_wars.pdf> accessed 9 December 2017

society free of drug abuse, regardless of whether the strategies used are violent or not, the war is lost.

Many of the current international positions in relation to IDCR, which will be analysed in the upcoming chapters, revolve precisely around this idea. As noted during the negotiation of the document resulting from UNGASS 2016, there is a position among States, that question the current regime, which believes that achieving a society free of drug abuse is a utopia and that the international regime should be dedicated to address the adverse consequences and effects of the use of drugs through the so-called "harm reduction". Although the idea of a society free of drug abuse was finally included in the document resulting from UNGASS 2016, clearly it is no longer an objective shared by all international actors, so that, effectively, it no longer exists a consensus around the importance of winning the War on Drugs.

3. Theoretical Framework

It is necessary to differentiate between different possible changes in international regimes. Some changes can be adjusted to the flexibility of the regime, while others can cause a rupture in it. This is directly related to what we can call "core aspects" of the regime. In that sense, the flexibility of the regime, by nature, has to have limits, and once this limit is crossed, a rupture occurs.

The flexibility of the regime is determined by the fundamental principles and norms that are at the core of the international regime, around which the expectations of the actors converge and that determine which practices will be considered legitimate and acceptable. If the practice is consistent with the fundamental core of principles and norms, then it can be considered within acceptable limits. If, on the contrary, a practice does not completely follow the main principles and norms but there is space for reinterpretation, it could be said that States are making use of the margins of flexibility of the international regime.

Deviations in the regime can be tolerated or objected by the institutions responsible for monitoring compliance with the regime, but States can justify their location within the margins of flexibility based on arguments related to ambiguity, capacity and adaptation to changing conditions. In this sense, three types of policies and practices can be identified: 1) those that comply with the acceptable level, whose adherence to the core is out of the question (in the case of the IDCR, INCB and CND would be the entities in charge of determining what is acceptable inside the regime); 2) those that deviate from the regime, whose degree of adherence to the core is questioned but that move within the generally accepted margins of flexibility of the regime; and 3) policies and practices that do not comply with this fundamental core, which go beyond the regime's limits of flexibility and which, therefore, are not acceptable⁹⁶.

⁹⁶ Constanza Sánchez Avilés, 'El régimen internacional de control de drogas: formación, evolución e interacción con las políticas nacionales. El caso de la política de drogas en España' (PhD thesis, Universitat Pompeu Fabra 2014)

The case studies that will be addressed in chapters 6, 7 and 8 of this thesis cover precisely these differences between the policies that can be adopted by States and how they affect the regime. Chapter 6 will explore the withdrawal and re-accession of Bolivia, with a reservation, to the 1961 Convention. As several Member States indicated, that reservation was against the spirit and core of the treaty, so it should not have been accepted because it was causing a rupture inside the regime. Nevertheless, for the majority of States that did not question the Bolivian reservation, it could be said that, at least for them, it moved inside the flexibility of the regime. Chapter 7 will show how INCB considered that the Portuguese actions also caused a break in the regime, but subsequent reinterpretations of the Member States understood that the Portuguese strategy although deviated in some way from the basic principles of the regime, if it could be accepted within the margins of flexibility. Finally, chapter 8 will present obvious cases of policies that have been causing a break in the regime, given that legalizing cannabis for medicinal use, as Uruguay, Canada and some States of the United States have done, directly threatens the core of the regime.

3.1 Conceptualization of international regime

Illicit drug trafficking and how to tackle it has been dealt by international actors through agreements and decisions taken by countries, both on an individual and collective way. In addition, different international organizations have used many resources to develop different ways to help States to fight the War on Drugs. To understand the current IDCR, it is important to understand what an international regime is. Stephen Krasner defines regimes as “*sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions of proscriptions for actions. Decision-making procedures are prevailing practices for making*

and implementing collective choice"⁹⁷. Another very useful definition that is also used by Krasner is the one from Robert Keohane and Joseph Nye. They define regimes as "*sets of governing arrangements that include networks of rules, norms and procedures that regularize behaviour and control its effects*"⁹⁸.

Following these two definitions, it could be understood that international actors, specifically States, agreed to establish an IDCR to coordinate a response against the problem based on the common belief that international cooperation would be the best way to fight a problem that doesn't believe in borders. It was important for States to avoid the possible costs of non-coordinated actions. Therefore, through the instauration of an IDCR, States established ways of cooperation but also limitations to their freedom of acting against the problem in any way they wished, thus adapting their behaviour to the regime they agreed on.

This brings us to the principle that an international regime can have mandatory rules accepted and implemented by all States. However, it can also have rules and norms that are theoretically accepted by all parties but are not effectively implemented. This is directly linked to the Decision-Making Process of the regime, which could involve the participation of all States parties of the regime following an established set of rules or could just be a way to legitimize what States have already done on a national basis. International regimes are not always the same, thus, they are not equally strong and important. The core of the strength of an international regime can be found on the power of their decision-making bodies and international institutions that are part of the regime and, sometimes, have even been created by it to establish rules and norms that are going to be followed by all States.

Bearing this in mind, Jack Donnelly defines international regimes as "*norms and decision-making procedures accepted by international actors to*

⁹⁷ Stephen Krasner, *International Regimes*. (Cornell University Press 1983) 2.

⁹⁸ Robert Keohane and Joseph Nye, *Power and interdependence*. (Little Brown 1977) 19

*regulate an issue*⁹⁹ focusing on the decision-making procedures,¹⁰⁰ and believes that there are four different types of international regimes accordingly to one of the following four ways of creating norms. Therefore, the decision-making bodies and international institutions may have:

1. *Authoritative international norms: binding international standards, generally accepted as such by States.*
2. *International standards with self-selected national exemptions: generally binding rules that nonetheless permit individual States to "opt out," in part. (For example, States may choose not to ratify a treaty or to ratify with reservations.)*
3. *International guidelines: international standards that are not binding but are nonetheless widely commended by States. Guidelines may range from strong, explicit, detailed rules to vague statements of amorphous collective aspirations.*
4. *National standards: the absence of substantive international norms*¹⁰¹

However, a regime can be defined not only accordingly to its capacity to create norms but also on how it interacts with the State Parties to make these norms effective. Thus, a regime can enforce the norms it created, to help States implement these norms or just to promote their international acceptance. The strength of a regime is directly linked to its capacity not only to enforce the norms but also to monitor their implementation among States.

Of course, there are some limitations to the theories that have just been presented. As it is generally accepted, one of the international system characteristics is anarchy. Moreover, in practical and/or normative terms, States are not equally obliged to follow the same rules at the same time and level. There is no universally accepted way to force States to fulfil their international obligations, and although sanctions such as the ones approved by the Security Council or the possibility of losing international cooperation have sometimes been proved effective, the history of international relations

⁹⁹ Jack Donnelly, 'International Human Rights: A Regime Analysis. (1986) 40(3) International Organization 599

¹⁰⁰ Jack Donnelly, 'Las Naciones Unidas y el régimen global de control de drogas' in Peter Smith (ed), *El combate a las Drogas en América* (Fondo de Cultura Económica 1993)

¹⁰¹ Jack Donnelly, 'International Human Rights: A Regime Analysis. (1986) 40(3) International Organization 599

show several cases where States have not complied with international obligations with impunity. There are two ways to understand this fact: either the international regimes are too weak to prevail and to enforce their rules and norms, or the role of the countries inside the regime is different considering the leverage they might have accordingly to their soft or hard power.

3.2 Regime changes

It is understandable to believe that regimes evolve through time. However, the change of a regime through its natural evolution is different from changes that might be promoted by specific groups of States. Following Stephan Haggard and Beth Simmons, it can be said that *“regimes often contain rules which govern or specify their own transformation, but to explain regime change per se is to explain why States would agree to modify the codified rights and rules that regulate their behaviour”*¹⁰².

These authors consider that there are four characteristics of a regime that might change: its strength, organizational form, scope, and allocational mode. In terms of strength, they refer to the degree of compliance of States to the norms of the regime, and the capacity of the regime to enforce these norms. Likely, the "strength" is one of the factors of change within the regimes that has been studied the most from the point of view of international relations, given the interest of many to understand the reasons why a regime decays and disappears. Changes in the organizational form can be mostly understood as variations in the administrative apparatus, the system to collect and share information, the structure of the decision-making bodies, etc. Changes in the scope are mostly those referred to the range of issues the regime covers. Finally, changes in the “allocational mode” refers directly to variations in the resource allocation system.

¹⁰² Stephan Haggard and Beth Simmons, ‘Theories of international regimes’ (1987) 41(3) International Organization 491

There are different theoretical approaches to regime development and change. However, these theories can be classified in two groups. On the one hand, the first group of theories believes that foreign policy is directly related to domestic structures and processes¹⁰³. Thus, changes in international regimes are promoted by countries from variations of their own domestic and national situations. On the other hand, the second group of theories focus on changes through the evolution of ideologies, values and knowledge regarding how to achieve specific goals.¹⁰⁴

3.2.1 Theoretical approaches to regime change and variance

Continuing with the information provided by Stephen Haggard and Beth Simmons, the theories about changes and developments in international regimes can be catalogued into 4 groups: structural, game-theoretical, functional, and cognitive. As the mentioned authors point out, these theories are not mutually exclusive, and many of the processes of variations within the regimes can be understood by applying more than one theory. *“Yet these approaches often speak past one another-in part because of fundamental differences in their underlying assumptions, in part because they address different dimensions of regime change and variance”*¹⁰⁵. The first big difference between these different groups of theories is that, while the structural, game-theoretical, and functional ones focus on the States and their interaction, the cognitivists focus more on the evolution of the actors, the ideologies and consensual knowledge¹⁰⁶.

¹⁰³ Andreas Hasenclever, Peter Mayer and Volker Rittberger, 'Integrating Theories of International Regimes' (2000) 26(1) RIS 3

¹⁰⁴ Stephan Haggard and Beth Simmons put in the First group what they call structural, game-theoretic, and functional approaches. The second group is integrated by cognitive theories.

¹⁰⁵ Stephan Haggard and Beth Simmons, 'Theories of international regimes' (1987) 41(3) International Organization 491

¹⁰⁶ Olav Stokke, *Disaggregating International Regimes : A New Approach to Evaluation and Comparison* (MIT Press 2012)

3.2.1.1 Regime Changes through Structural Theories

Structural theories focus more on international conditions and on the international framework as the main agents of change and influence in the regimes. In short, and quoting the most basic ideas of Kenneth Waltz, it is the structures that define the behaviour of States¹⁰⁷. Therefore, one main principle is the one of the hegemonic stability, where the stability of the regime is directly linked to the stability of the super-powers, that can also be called hegemons.

Structuralist theories, to understand the formation, maintenance and evolution of international regimes, often focus on the hegemonic power as a determining factor. *Structural explanations, particularly including the theory of hegemonic stability, attempt to show how international conditions define the possibilities for cooperation. Structuralists argue that we cannot infer national policies from intentions because structures tend to mold state behaviour toward a common quality of outcomes even though the efforts and aims of agents and agencies vary*¹⁰⁸. In that sense, a weakening of the power of hegemony, or a variation in it, for example, through changes in its internal policy, will affect the stability of the regime.

Two aspects can be detached from this idea. The first, defended by Keohane and Nye¹⁰⁹, indicates that the most powerful will dominate the weakest, establishing the conditions under which the regime will be governed. The second one indicates that the hegemonic power benefits from an orderly regime and, therefore, is willing to deliver a series of benefits, for example, those that allow the maintenance of the regime, in exchange for benefits that, in terms of quantification, could be less than the costs. In that sense, in certain regimes there are States, mostly minor powers or developing States, that benefit from the regime, although it has

¹⁰⁷ Kenneth Waltz, *Theory of International Politics* (Addison-Wesley 1979) 79-102

¹⁰⁸ Kenneth Waltz, *Theory of International Politics* (Addison-Wesley 1979) 74-80

¹⁰⁹ Robert Keohane and Joseph Nye, *Power and interdependence*. (Little Brown 1977)

been imposed to some extent. Bearing that in mind, it can also be pointed out that it is the weaker States that benefit from the hegemonic power¹¹⁰.

Structuralism serves in theoretical terms more to understand correlations than to explain processes. Undoubtedly, structuralist theories have more aspects than those that have been explained in the present summary. However, a structural approach is not enough to understand the changes that certain States seek to make within the current IDCR. In the first place, there is no correlation between hegemonic powers or the weakening of a hegemonic power that is promoting changes within the regime. In general terms, although the IDCR was established by the great powers during the twentieth century, the changes that are being promoted are not explained due to a weakening of these powers. With that in mind, let's look at how another theoretical approach could be giving or promoting changes within the regime¹¹¹.

In the case of the IDCR, a structuralist approach can serve to understand the relationships that have been forming between the States based on changes that are being promoted within the regime. As already noted, there is a growing number of States that are appealing to have an approach based on human rights and public health when addressing the WDP. This change within the vision of the States is generating minor changes within the regime. However, in hegemonic terms, there is not yet a hegemon or a great power propitiating these changes within the regime. Russia and China, for example, defend the most punitive traditional policies, while the United States, at least at the federal level, has not signalled its intention to support a change in the international strategy. In that sense, there is no destabilization of the regime based on changes within a hegemon.

¹¹⁰ Stephen Krasner, 'Structural causes and regime consequences: Regimes as intervening variables' (2012) 20(42) *Revista de Sociologia e Política* 93

¹¹¹ Stephen Krasner, 'Structural causes and regime consequences: Regimes as intervening variables' (2012) 20(42) *Revista de Sociologia e Política* 93

3.2.1.2 Regime changes through the Strategic and game-theoretic approaches

The school of the Strategic and game theoretic approach is useful to explain part of the emergence of the current IDCR, but it could be found insufficient to analyse the reasons why the regime can change. Game theory is based on the importance of cooperation between different parties in search of the greatest possible benefit. In that sense, used in the theory of international relations, it focuses primarily on cooperation between States. However, it should be noted that international cooperation can occur outside a regime. Therefore, in some cases this approach helps to understand the emergence of regimes since cooperation is a step prior to the establishment of a regime, but it doesn't in all cases end up forming one. *A game-theoretic analysis requires answers to three basic questions: (1) who are the actors? (2) what are the options they perceive to have in the situation? (3) what are the payoffs (or utilities) that the actors attribute to each possible outcome?*¹¹²

Through the Strategic and game-theoretic approach, we understand that States fulfil their obligations either in a cooperative system or within a regime, if this has been formed, aware that this situation presents them a greater benefit than the one it would get by acting alone. However, this theory does not delve much into the circumstances that cause the regime to change. It could be considered, for example, that a "sub game" is formed within the "game" that gave rise to the regime. This postulate could help us understand the current change that has been promoted within the IDCR. In the beginning, and as indicated in the introduction of this research, the States considered that through cooperation it would be more effective to tackle the WDP, thereby establishing the current regime. However, there is a group of States that are playing a separate "game", through which, by cooperating among themselves, they seek to introduce changes in the regime. In that sense, the Strategic and game-theoretic approach leads to the need to understand the national and international conditions of the

¹¹² Andreas Hasenclever, Peter Mayer and Volker Rittberger, 'Integrating Theories of International Regimes' (2000) 26(1) RIS 3

regime, in such a way that it can be understood why the States decide to break with the "game".

3.2.1.3 Regime changes through Functional theories

The proper test of a functional theory is understanding the regime's effectiveness¹¹³. It tends to explain that actors' behaviour, while constructing or modelling a regime, is guided by the idea that benefits will be provided uniquely, or at least more efficiently, through the establishment of the regime. Another main point is the concept of reputational concerns connected to the existence of rules. Functional theories, although they also focus on the interaction between the actors (States and International Organizations), do so from a different point of view. The functionalists seek to explain how the regime affects the interaction among its members, considering the regime as an institution with established rules¹¹⁴. If the scheme is beneficial for the members, then this will encourage them to comply with the established obligations. In that sense, for functionalism it is important to know what the possible consequences of the regime are, to understand what its possible future is.

Regarding possible changes within the regime, per this theoretical school, these occur when the regime stops working for all or some of its members. Similarly, one regime can give rise to another when cooperation mechanisms change or expand, almost as an unintended consequence. However, this leads to one of the main criticisms that are made to functionalism, since it fails to determine why the regimes arise in some areas where States cooperate and not in others. At the same time, they do not explain why some regimes become more complex and not others, for example, through the establishment of international organizations. Going

¹¹³ Andrew Kydd, *International relations theory: the game-theoretic approach*. (Cambridge University Press 2015)

¹¹⁴ Stephan Haggard and Beth Simmons, 'Theories of international regimes' (1987) 41(3) *International Organization* 491, 506-509

one step further, it could be said that functionalism does not make a clear difference between regime and international organization.

“The problem with conventional functional explanations of cooperation (...) is that they fail to take into account that actors (...) usually face several possibilities for cooperating which cannot easily be distinguished in terms of efficiency and self-interest. Therefore, most problematic social situations are underdetermined from a purely interest-oriented perspective: the variables employed by rationalists (i.e. efficiency and self-interest) do not suffice to explain the outcome.”¹¹⁵

Functional theories focus primarily on the impact that the regime has on the behaviour of States and on how common interests that give rise to the regime are identified. However, the regimes, for example the IDCR, are also scenarios of confrontation and power struggle, an aspect in which functionalism does not go into much depth. Notwithstanding the foregoing, from a functionalism perspective it can be observed that there are States favouring changes within the IDCR because they consider that it does not longer benefit them as they thought it would at the time of establishing it. Starting from the argument that the current IDCR has not managed to solve the WDP, it is assumed that it has failed, that it did not achieve what it was predicted to do, and therefore needs changes.

The issue of the effectiveness of the regime and how this is related to possible changes is probably one of the most important factors of the current IDCR situation. A striking case is that of those countries that have begun policies aimed at the legalization of cannabis for recreational purposes, or that have already legalized this type of narcotic drugs. While this thesis will devote an entire chapter to this new reality, it is appropriate to mention that the effectiveness of the regime in many ways has been questioned by States such as Canada and Uruguay, which, in flagrant

¹¹⁵ Andreas Hasenclever, Peter Mayer and Volker Rittberge, ‘Integrating Theories of International Regimes’ (2000) 26(1) RIS 3, 29

violation of the IDCR based on the three conventions, have decided to modify its domestic legislation to allow the recreational use of cannabis. Similar situation has happened in states of the United States, although at the federal level the use of cannabis for non-medical or scientific purposes is still prohibited.

3.2.1.4 Regime changes through cognitive theories

Finally, we find that the cognitive theories focus more on the ideology, values, beliefs and knowledge available of the main players of the different countries to explain regime changes. *The core cognitive insight is that cooperation cannot be completely explained without reference to ideology, the values of actors, the beliefs they hold about the interdependence of issues, and the knowledge available to them about how they can realize specific goals*¹¹⁶. All this information is what helps to describe and understand international cooperation.

*It is useful to distinguish two strands within the cognitivist school of thought in regime analysis: 'weak' and 'strong' cognitivism. Weak (or minimalist) cognitivists focus on the role of causal beliefs in regime formation and change. (...) If weak cognitivists stress the intellectual underpinnings of international institutions, strong (or maximalist) cognitivists—who also go by the names 'reflectivists' and 'constructivists'—emphasize the social character of international relations*¹¹⁷.

Following Haggard and Simmons, it could be said that the above mentioned three theories believe that cooperation operates within an issue or area relatively unambiguously. Nevertheless, the cognitive school believes that issues and areas are always ambiguous. *Cognitive approaches are*

¹¹⁶ Stephan Haggard and Beth Simmons, 'Theories of international regimes' (1987) 41(3) International Organization 491, 509

¹¹⁷ Andreas Hasenclever, Peter Mayer and Volker Rittberger, 'Integrating Theories of International Regimes' (2000) 26(1) RIS 3, 10

*therefore particularly important in explaining the substantive content of regime rules and why they evolve. By elevating the importance of actor learning, cognitive theories have a dynamic other theoretical approaches lack*¹¹⁸.

What is indicated by the cognitive school is useful to understand part of the changes that are being promoted within the IDCR. In the first place, one of the main arguments is precisely that during the more than 50 years that the current regime has been implemented, the international community should have learned that the strategies that have been applied do not work. In this regard, several countries of the EU, as well as Canada, have indicated that the recent scientific evidence demonstrates the need to rethink the strategies implemented to give greater priority to the public health and social aspects of WDP. However, one of the main problems presented by this so-called "scientific evidence" is that it often comes from sources that are not particularly impartial. The evidence and knowledge that affects the decisions of the actors is diverse and often contradictory. In that sense, it should be the UNODC and the INCB the institutions that provide information as impartial as possible, even though many times their investigations are financed by States that seek a specific result¹¹⁹.

On the other hand, the ideological aspect that cognitive theories seek to develop is also very present in the current IDCR. Countries with authoritarian ideologies seek to promote more restrictive approaches, while countries with more liberal government systems focus on progressive strategies. An example of the impact of ideology on a given actor that will be analysed in more depth in future chapters is the case of Bolivia. After Evo Morales, leader of the coca leaf farmers, assumed the presidency of this andean country, he promoted changes that determined the withdrawal of Bolivia from the Single Convention, just to return to it with a reserve that

¹¹⁸ Stephan Haggard and Beth Simmons, 'Theories of international regimes' (1987) 41(3) International Organization 491, 510.

¹¹⁹ Andreas Hasenclever; Peter Mayer; Volker Rittberger, 'Interests, Power, Knowledge: The Study of International Regimes' (1996) 40(2) Mershon International Studies Review 177

would allow his country to produce coca leaf without violating its international commitments.

As indicated above, and as is customary in international relations, a single theoretical approach is insufficient to understand the process of changes and modifications in international regimes. Many times, the motivations of the actors are due to aspects that need a multi-theoretical approach to be understood. The case of the changes that are being promoted within the IDCR is not an exception. There are different reasons why some States seek to establish changes in the regime, which include ideologies, changing realities, new situations, perception that the regime has stopped working, among many others. This reality in which many aspects of the different theories challenge each other will be analysed later in greater detail in the study cases that are part of this investigation.

3.3 Regime based on “soft” and “hard law”.

One of the main conflicts in which the IDCR is nowadays involved is that which confronts "soft law" with "hard law". In general terms, and although there are different definitions of these two terms, there is a general agreement between different scholars that "hard law" is based on documents that are legally binding, while soft law is based on declarations, resolutions, and documents that, in theory, are not mandatory for States. Quoting Alan Boyle, the main characteristics of soft law are that it is not binding, because it *consists of general norms or principles, not rules*, and *“is not readily enforceable through binding dispute resolution”*¹²⁰.

However, there are certain theoretical disagreements. For example, from a point of view of positivism, the concept of "soft law" would have no meaning, since positivists believe that the term "law" necessarily implies the term "binding"¹²¹. Therefore, non-binding documents are not law. On the other

¹²⁰ Alan Boyle. 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) *BIICL* 902

¹²¹ Marysia Zalewski, Steve Smith and Ken Booth, *International theory: positivism and beyond* (Cambridge University Press 1996)

hand, international realism would argue that almost all international law would come to be "soft law", since there are no centralized entities capable of compelling compliance on the international level. Therefore, international law will be binding only if States, mainly the more powerful ones, want it to be. Finally, the constructivists point out that what really matters are not the categories of "soft" or "hard" law when generating the norms, but the real impact they have on the behaviour of the States and international organizations. *Constructivist scholars, in contrast, focus less on the binding nature of law at the enactment stage, and more on the effectiveness of law at the implementation stage, addressing the gap between the law-in-the-books and the law-in-action.*¹²² Although the theoretical approaches are different when talking about "soft" and "hard law", in practice, it could be said that none of these theories prevails, but that a mixture occurs depending on the moment, the context and the documents concerned.

International actors such as States and organizations do create many different documents to regulate their behaviour, and they give these documents different categories and relevance. *It is a well-known fact that international organizations, formal ones like the United Nations as much as informal ones like the G8, more and more frequently adopt rules which their drafters do not consider to be "legally binding", although they otherwise have all the textual characteristics of binding international treaties or binding resolutions of international organizations.*¹²³

In the case of the current IDCR, this difference is not clear. The regime is based on documents that might seem characteristic of "hard law", such as the Three International Drug Control Conventions, although it is difficult to establish if they are enforceable or not.

Here the contrast is between a treaty subject to compulsory adjudication in cases of dispute, such as the 1982 UN Convention on the Law of the Sea, and a treaty or other

¹²² Gregory Shaffer and Mark Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2009) 94(3) MLR 706, 713

¹²³ Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25(2) LJIL 335

*instrument under which disputes can be referred unilaterally only to non-binding conciliation or a non-binding compliance procedure, such as the Montreal Protocol to the Convention on the Ozone Layer. These examples represent only some of the gradations on a spectrum of possibilities, which shade ultimately into dispute avoidance, but in this category, it is the character of the dispute resolution process which determines whether we have hard or soft law*¹²⁴.

Theoretically, the States are obliged to comply with the provisions of the three conventions, and the INCB is the entity in charge of indicating whether the States comply with their international obligations. Nevertheless, INCB and the international community, besides framing and shaming, do not have the possibility of enforcing compliance when States apply strategies outside the framework of the three conventions, as it is happening with countries such as Canada and Uruguay that are legalizing cannabis for recreational purposes.

On the other hand, documents such as the Political Declaration of 2009, its Plan of Action, the resulting document of the UNGASS 2016, and the different resolutions of the CND, are documents that are based on the "soft law", and although there is a theoretical commitment on the part of the States to comply with what is established in those documents, there is no follow-up mechanism that really obliges them to do so. Similarly, neither other Member State nor the INCB itself can blame them for not following the provisions of the "soft law" documents, considering that there is no mechanism whatsoever that really obliges States to achieve those objectives.

Despite this situation, the "soft law" has mechanisms to preserve itself as valid and in a certain way binding within the international system. An example of this is what Alan Boyle calls "soft enforcement", referring to

¹²⁴ Alan Boyle. 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) BIICL 902

non-binding conciliation before an independent third party, or to some form of non-compliance procedure involving other parties to the treaty. In both situations there is an attempt to find an agreed solution, rather than to engage in adversarial litigation or claims for reparation. Soft enforcement characteristically evades issues of responsibility for breach and relies on a combination of inducements or the possibility of termination or suspension of treaty rights to secure compliance.

In the case of the IDCR, the most iconic case of "soft enforcement" could be considered the so-called "Article 14" to which the INCB refers whenever it wishes to draw the attention of the States in cases of non-compliance with the three conventions.

Over the years, the Board has invoked article 14 of the 1961 Convention and/or article 19 of the 1971 Convention with respect to a limited number of States. The Board's objective has been to encourage compliance with those Conventions when other means have failed. In 2000, the Board invoked article 14 of the 1961 Convention as amended by the 1972 Protocol with respect to Afghanistan, in view of the widespread illicit cultivation of opium poppy in that country. Afghanistan is currently the only State for which action is being taken pursuant to article 14 of the 1961 Convention as amended by the 1972 Protocol.

Article 14 of the 1961 Convention (and that Convention as amended by the 1972 Protocol) and article 19 of the 1971 Convention set out measures that the Board may take to ensure the execution of the provisions of those Conventions. Such measures, which consist of increasingly severe steps, are taken into consideration when the Board has reason to believe that the aims of the Conventions are being seriously endangered by the failure of a State to carry out their provisions. The States concerned are not named until the Board decides to bring the situation to the attention of the parties, the Economic and Social Council and the Commission on Narcotic Drugs (as in the case of Afghanistan). Apart from Afghanistan, the States concerned have taken sufficient

*remedial measures so that the Board was able to terminate action taken under those articles vis-à-vis those States.*¹²⁵

This is definitely the main tool on which the INCB is based in order to force States to comply with their obligations under the three conventions. Independently of the fact that it has not been used widely, and that finally the application of article 14 does not have considerable effects on the rights of States Parties to three conventions, it should be noted that, since the creation of the INCB, States have sought to avoid INCB to apply article 14 to them, which demonstrates their relative effectiveness.

Although it could be considered that "soft law" is much less important than "hard law" (if we challenge realism and believe that "hard law" exists), it has been used on different occasions as a mechanism of pressure towards a certain group of States. If really the "soft law" does not have any importance, the interested countries would not defend so fervently their different positions while negotiating soft law instruments. For instance, at the Conference of States Parties to the United Nations Convention against Corruption (UNCAC), which took place in 2017, Peru, Norway and Chile presented a resolution against corruption that involved "large amounts of assets". During this negotiation, the Delegation of Lichtenstein, which has often been characterized by not participating, was represented up to 5 expert delegates, seeking to safeguard the interests of their country.¹²⁶

The importance of "soft law" lies also in the fact that it can be used as a source for other types of international rights and they could be a first step to the conclusion of multilateral treaties. An iconic case is pointed out by Mark Pollack and Gregory Shaffer¹²⁷. At the end of the 1990s, Brazil established a series of patent laws to guarantee access to retroviral for the most

¹²⁵ International Narcotics Control Board, 'Promoting the consistent application of the international drug control treaties' <<https://www.incb.org/incb/es/treaty-compliance/index.html>> accessed 21 October 2018

¹²⁶ Based on personal observation

¹²⁷ Gregory Shaffer and Mark Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2009) 94(3) MLR 706

vulnerable people suffering from HIV. This situation, which went against the interests of the pharmaceutical companies of the United States, generated a great rejection by the North American country, which presented a series of complaints before the World Trade Organization (WTO). However, Brazil used "soft law" instruments to put pressure on the United States, making it possible for 52 Member States to endorse in the Human Rights Council its policy to combat HIV. At the same time, the Human Rights Council approved a resolution presented by Brazil in 2001 in which access to retroviral drugs was established as a human right. Despite the ironclad opposition on the part of the United States to the approval of the mentioned resolution, finally this one was approved, and the United States put in indefinite suspension its claim before the WTO.

Both "hard" as well as "soft law" instruments are an essential part of the IDCR. But how "hard" is the "hard law" in the current IDCR? In principle, it would seem to depend on the relative power of States. Currently, three countries have begun to challenge the core documents of the regime by legalizing cannabis for recreational purposes. Absolutely nothing has happened that forces these States to amend their course. And it is very interesting to have both Uruguay and Canada in this group of countries, considering that their relative power in realistic terms is very different. However, and as will be seen in greater detail in chapter 8 of this investigation, beyond the "blaming" and "framing" carried out by the INCB, nothing has happened in terms of sanctions for violating international commitments. In that sense, the current strength of the regime does not lie in the traditional definitions of "soft" or "hard" law, but in the real interest of States in complying with the provisions of the regime.

3.4 Principle of Common and Shared Responsibility

On many occasions, the international community has agreed *"to engage in effective cooperation and practical action aimed at addressing the World Drug Problem based on the principle of common and shared responsibility and reaffirmed that Member States should strengthen their mechanisms for*

*cooperation and coordination in order to achieve results in countering the World Drug Problem more effectively*¹²⁸. But what does common and shared responsibility regarding the WDP really mean and why should it have more meaning than ever?

This principle is not only applied to the drug control regime. To address a global problem through the idea of common and shared responsibility allows States and Organizations to cooperate on a multilateral level by establishing common goals to address a common problem, goals that need to be reached through a coordinated action. *Consequently, the principle of common and shared responsibility commits parties to strengthening their cooperation not only to pursue their own interests but also to take into account the interests of others and to assist those parties that need help.*¹²⁹

The concept as it is applied today has been evolving for many years. In the eighties, the international community spoke about collective responsibility in drug control, which recognized that it was the responsibility of all States to get involved in the War on Drugs whether they were considered part of the problem or not. In the nineties, States started to speak about shared responsibility and began to differentiate the problems States were responsible for.

It should be noted that the establishment of the principle of common and shared responsibility was mainly the initiative of the producer countries, since they pointed out that the developed countries were the main responsible for the demand for drugs, although the strategies and interventions focused mainly on the aspects of production, pointing to the producing countries as the main responsible for the problem. In this sense,

¹²⁸ Commission on Narcotic Drugs 'Strengthening of the principle of common and shared responsibility as the basis for guiding international action in combating the world drug problem with a comprehensive and balanced approach' (15 March 2011) CND Doc 56/9

¹²⁹ International Narcotics Control Board, 'Contribution of the INCB to the high-level review of the implementation by Member States of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem' <https://www.incb.org/documents/Publications/ePublication/E-Publication_E_FINAL.pdf> accessed 21 October 2018

and considering that illicit drug trafficking is an illegal economic activity that obeys the rules of supply and demand, the principle of common and shared responsibility is the cornerstone of the cooperation that takes place in the matter of drugs, through which the developed States have committed themselves to cooperate in terms of reducing production and supply in third countries as well as reducing demand in their own territories¹³⁰.

In the absence of the principle of common and shared responsibility regarding the approach to the WDP, all the discussion that is taking place today about possible changes in the regime would be meaningless, given that each State would be in the freedom to apply the strategies it wished.

Despite everything presented on common and shared responsibility, and although no one doubts that this concept is nowadays a fundamental part of the IDCR, one aspect is extremely striking: none of the Three International Drug Control Conventions, cornerstone of the regime, reflects the principle of common and shared responsibility.

The preamble section of the 1988 Convention recognizes that the *"eradication of illicit traffic is a collective responsibility of the States and that, to that end, coordinated action within the framework of international co-operation is necessary"*, but this was established before the concept of common and shared responsibility was created, thus, it served as a source for the concept.

It is noteworthy that a concept that is not included in any of the three conventions on drugs plays such an important role in the international regime. The main arguments against the current regime indicate that it does not have the capacity to modernize or adapt to a reality as changing as the presented by the WDP. However, the regime has been able to adapt to a

¹³⁰ International Narcotics Control Board, 'Shared responsibility in international drug control' (International Narcotics Control Board, 2012)
<https://www.incb.org/documents/Publications/AnnualReports/AR2012/AR_2012_E_Chapter_I.pdf> accessed 27 July 2018

changing reality and to a new way of understanding international cooperation aimed at addressing the WDP. The three conventions do not establish specific measures under which States must address the problem of drugs. They only provide guidelines and general parameters to which all Member States committed to. Nowadays, the principle of common and shared responsibility is recognized in every single drug control document negotiated by States as part of the international regime, simply because the three conventions do not prevent States of doing so. As long as new concepts, ideas and strategies do not go against what is established in the conventions, they can become part of the regime¹³¹.

¹³¹ International Narcotics Control Board, 'Shared responsibility in international drug control' (International Narcotics Control Board, 2012)
<https://www.incb.org/documents/Publications/AnnualReports/AR2012/AR_2012_E_Chapter_I.pdf> accessed 27 July 2018

4. Analysis of the main international instruments on drugs

The Parties,

Concerned with the health and welfare of mankind,

Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,

Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,

Conscious of their duty to prevent and combat this evil¹³²,

What was established in the initial part of the single 1961 convention demonstrates to some extent the direction that Member States wanted to follow when establishing the current IDCR. In the first place, we can observe a concern for the welfare of humanity, which is philanthropically very interesting. Subsequently, they recognize the importance of narcotic drugs for medical purposes, which is also a basis, at least theoretically, of what is now the IDCR. However, the use of the word "evil" in the following paragraphs has caused a great confrontation at present, given that there is a perception among States that seek to change the current international regime that understanding drug addiction as an "evil" stigmatizes to the user, when in fact it should be considered a disease.

4.1 International Drug Control Regime based on the three conventions

Based on the theories that have been presented, and as it has already been said, the current IDCR is based on the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. One of the most important facts of the Single Convention of 1961 is that it replaced many

¹³² Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol (adopted 25 March 1961) 1

other instruments that were agreed by States, especially those concerning opium regulations. It should be noted that this section of this research will deal in a general way with the scope of the three international conventions and the international organizations that are based on them.

One of the main principles of the current IDCR is the principle of “common and shared responsibility”, considering that *“every country has responsibilities to other countries and as members of an international community they must comply with a minimum set of rules that facilitate international relations”*¹³³. In general terms, it can be said that the main objective of the current regime is to forbid any use of drugs that is not related to scientific and medical purposes, as it is clearly established in the Single Convention of 1961.

Nevertheless, and considering the current debate regarding the “possible need” of making changes in the regime, States that consider that the three above mentioned conventions are obsolete have started to introduce the terminology “and other relevant international documents” in CND and UN General Assembly resolutions while speaking about the cornerstone of the IDCR. The main reason behind this is that, per their argument, there are some strategies and new policies they wish to implement that are not recognized in the three conventions. Thus, by establishing that other “relevant international documents”, such as the International Declaration on Human Rights, are also part of the cornerstone of the regime, theoretically they would be allowed to go beyond the three conventions.

However, and leaving this debate aside for a moment, the current IDCR is probably one of the strongest there is among the international community. It has strong decision-making bodies that seek to base their decisions on consensus among all States,¹³⁴ being the most important ones the CND, the ECOSOC and, above all of them, the General Assembly of the United Nations. Moreover, the same as all the resolutions that do not come from

¹³³ Francisco Thoumi, ‘The IDCR’s straight jacket: are there any policy options?’ (2010) 13(1) TIOC 76

¹³⁴ Although consensus is not a rule in the IDCR, it has been the basis for all the decisions made on drug related issues since the meetings of the Opium Commission in 2009.

the UN Security Council, the CND, ECOSOC and General Assembly decisions are as binding as the States really want them to be. Bearing this in mind, States have introduced in the current IDCR several organizations and institutions that seek to enforce and promote the compliance of States of the different norms and rules.

The CND has been recognized in all relevant documents as the institution with the leading role regarding the way to address the International WDP, being in charge of developing and formulating anti-drug policies. CND Member States are elected by the ECOSOC and report directly to this council, which, at the same time, reports directly to the General Assembly¹³⁵. The main Institution aimed to help the Decision-Making Bodies to enforce and promote the international norms is the United Nations Office on Drugs and Crime (UNODC). This office based in Vienna not only works as the Secretariat form the CND and other commissions under the ECOSOC but is also in charge of managing the technical assistance provided to different countries on how to tackle the WDP. This is precisely one of the most important ways through which the regime must promote the compliance of the international norms: the technical cooperation. All the technical assistance provided by UNODC follows the principles established by the CND accordingly to the Three International Drug Control Conventions, and this cooperation will never go beyond its scope. States wishing to establish and try strategies not included in the regime will not only be in non-compliance with their international obligations but will also not receive any assistance to do so.

For instance, the new strategy implemented by Uruguay of controlling the commerce of cannabis, which is going to be explained on a later stage, is not receiving any official assistance of UNODC but is being monitored constantly.

¹³⁵ The way the regime has been working during the last decades is that ECOSOC and General Assembly only endorsed all decisions made by the CND. Nevertheless, during the last years, countries seeking to make changes in the current IDCR have been trying to bring part of the decision-making process directly to the UN General Assembly, considering that not all States of the International Community are represented in Vienna where the CND is based and that, because of that, they might get more support.

The monitoring aspect of the regime brings us to the INCB, which is called, in a very accurate way by Letizia Paoli, Victoria A. Greenfield and Peter Reuter, the “*watchdog*”¹³⁶ of the regime. In a very simple way, the INCB is in charge of monitoring and overseeing the Parties’ compliance with the conventions. It was created by the Single Convention of 1961 and it is one of the strongest defenders of the current IDCR, considering the enormous leverage INCB has while interacting with States. This strong defence of the regime is constantly shown in INCB Annual Reports. For instance, in the 2016 edition, INCB stated that

*“At the special session of the General Assembly, the international community reaffirmed the pivotal role of the conventions and reiterated its commitment to their implementation. However, some actors will continue to talk about a need to “modernize” the treaties and their provisions; INCB is of the view that the international drug control system continues to provide a modern and flexible structure that can meet the world’s drug control needs of today and tomorrow.”*¹³⁷

INCB is not able to punish States for non-compliance. As David Bewley mentioned, “*the INCB, as the body responsible for overseeing the operation of the treaties, has no formal power to enforce the implementation of the Convention provisions. Nor has the Board the formal power to punish parties for non-compliance*”¹³⁸. Nevertheless, through their annual reports and the ones from UNODC, it has acquired an interesting tradition of shaming and framing.

¹³⁶ Letizia Paoli, Victoria Greenfield and Peter Reuter. ‘Change is Possible: The History of the IDCR and Implications for Future Policymaking’. (2012) 47(8-9) SUM 923

¹³⁷ International Narcotics Control Board, ‘INCB Report 2016. (*International Narcotics Control Board*, 2016)
<https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016_E_ebook.pdf> accessed 22 November 2017

¹³⁸ David Bewley-Taylor, ‘Challenging the UN drug control conventions: problems and possibilities’ (2013) 14(2) IJDP 171

4.1.1 Role of the CND, INCB and UNODC

The strengthening of the inter-agency coordination system of the United Nations to comprehensively address the WDP is something that Member States have been promoting in recent years, to provide greater relevance to institutions such as UN-AIDS, the WHO and the Human Rights Council. However, and without detracting from the importance of all these organizations in the matter of drugs, the CND has been pointed out in several occasions as the main entity in charge of dealing with all matters related to drugs at the international level, with the direct support of UNODC and, naturally, of the INCB. These three institutions are, for now, those that control almost the entire functioning of the regime, despite the fact that, as will be explained, there are States that seek to increase the importance of those institutions that ensure compliance with human rights and with rights related to the public health aspects of drugs.

4.1.1.1 CND

The CND is the main body responsible for formulating policies of the UN drug control system. It is composed by 53 Member States, which are chosen by ECOSOC to ensure a geographically equitable representation. Nevertheless, other countries can attend as "observers". The CND meets in Vienna annually in March, during its regular session, and for intersessional meetings when required. In the CND, Member States debate the world drug situation, and adopt resolutions on related issues. The CND is also the body that makes final decisions on the proposals made by the World Health Organization to classify, declassify or reclassify a substance.

Although the CND was created before the three conventions, these instruments provided the Commission with new functions, making it function almost like a Conference of the Parties. In 1991, the General Assembly expanded the mandate of the Commission to serve as the governing body of the UNODC and to approve the budget of the United Nations Program

Fund for the International Drug Control, which represents more than 90% of the resources available to the United Nations for the control of drugs¹³⁹.

4.1.1.2 INCB

The INCB, as noted above, is an independent and quasi-judicial body constituted by experts that was established under the Single Convention on Narcotic Drugs of 1961. The INCB is composed of 13 members elected by ECOSOC, to serve a five-year term. Ten of them are chosen from a list of candidates proposed by Governments. The remaining three are chosen from a list of candidates proposed by the WHO for their medical or pharmacological experience. The members of the Board must be persons who, by their competence, impartiality and disinterestedness, inspire general confidence. Once appointed, the members of the Board exercise their functions impartially and in a personal capacity, with total independence from the governments. Broadly speaking, INCB deals with the following:

- 1. As regards the licit manufacture of, trade in and use of drugs, INCB endeavors, in cooperation with Governments, to ensure that adequate supplies of drugs are available for medical and scientific uses and that the diversion of drugs from licit sources to illicit channels does not occur. INCB also monitors Governments' control over chemicals used in the illicit manufacture of drugs and assists them in preventing the diversion of those chemicals into the illicit traffic;*
- 2. As regards the illicit manufacture of, trafficking in and use of drugs, INCB identifies weaknesses in national and international control systems and contributes to correcting such situations. INCB is also responsible for assessing chemicals used in the illicit manufacture of drugs, in order to determine whether they should be placed under international control.*

¹³⁹ United Nations Office on Drugs and Crime, 'Comisión de Estupefacientes'. (UNODC, 2013) https://www.unodc.org/documents/hlr/Leaflets/CND/13-87553_flyerA5_Ebook.pdf accessed 30 June 2018

In the discharge of its responsibilities, INCB:

- 1. Administers a system of estimates for narcotic drugs and a voluntary assessment system for psychotropic substances and monitors licit activities involving drugs through a statistical returns system, with a view to assisting Governments in achieving, inter alia, a balance between supply and demand;*
- 2. Monitors and promotes measures taken by Governments to prevent the diversion of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances and assesses such substances to determine whether there is a need for changes in the scope of control of Tables I and II of the 1988 Convention;*
- 3. Analyses information provided by Governments, United Nations bodies, specialized agencies or other competent international organizations, with a view to ensuring that the provisions of the international drug control treaties are adequately carried out by Governments, and recommends remedial measures;*
- 4. Maintains a permanent dialogue with Governments to assist them in complying with their obligations under the international drug control treaties and, to that end, recommends, where appropriate, technical or financial assistance to be provided.*

INCB is called upon to ask for explanations in the event of apparent violations of the treaties, to propose appropriate remedial measures to Governments that are not fully applying the provisions of the treaties or are encountering difficulties in applying them and, where necessary, to assist Governments in overcoming such difficulties. If, however, INCB notes that the measures necessary to remedy a serious situation have not been taken, it may call the matter to the attention of the parties concerned, the Commission on Narcotic Drugs and the Economic and Social Council. As a last resort, the treaties empower INCB to recommend to parties that they stop importing drugs from a defaulting

country, exporting drugs to it or both. In all cases, INCB acts in close cooperation with Governments¹⁴⁰.

4.1.1.3 UNODC

UNODC is the agency of the United Nations that aims to fight against drugs and transnational organized crime. This objective is carried out through three primary functions: research; persuasion to governments to adopt laws against crime and drugs as well as treaties; and technical assistance. It should be noted that the UNODC also functions as the Secretariat of the CND, the Commission for the Prevention of Crime and Criminal Justice (CCPCJ), the Conferences of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC), and the United Nations Convention against Corruption (UNCAC).

The agency has its headquarters in Vienna, Austria, and 21 field offices. Part of the work of UNODC is to educate people around the world about the dangers of drug abuse and to strengthen international interventions against the production and trafficking of illicit drugs and drug-related crimes. To achieve these objectives, UNODC has launched a series of initiatives, including alternatives to the cultivation of illicit crops, the monitoring of illicit crops and the execution of projects against money laundering. The World Drug Report presented annually by the UNODC is a summary of the main elements of importance on drug policies that are applied worldwide. However, unlike the reports of the INCB, the report prepared by the UNODC does not judge the state of compliance of the States of their international commitments in relation to the three conventions.

¹⁴⁰ United Nations Office for Drugs and Crime, 'International Narcotics Control Board (INCB) <<https://www.unodc.org/lpo-brazil/en/drogas/jife.html>> accessed 19 July 2018

4.2 Strength of the regime through the difficulty to change it

When States established the current IDCR it was quite clear that they wished the regime to last for a long time, considering the obstacles they implemented to change it. David Bewley-Taylor, who has been studying the drug control regime for a long time, considers that there are two types of regime change that can be made: modifications and amendments¹⁴¹. Amendments are changes in the articles of the conventions, while modifications are changes in the drug schedules the three conventions established.

To make modifications in the regime is not as difficult as it may seem, and it can be considered as a minor change in the regime because a substance that was not under the surveillance system of the regime starts to be controlled, thus affecting, for example, the trafficking of the substance. Almost every year the CND makes modifications to the regime. The 1961 and 1971 conventions have lists of controlled substances, while the 1988 has tables. These lists and tables established how substances were going to be controlled accordingly to the level of risk they represent for society and public health. Modifications or changes on the lists of controlled substances of the 1961 and 1971 Conventions usually come as a recommendation from the WHO, after a group of experts of this organization sends the CND its conclusions of studies about groups of substances for further classification. A Member State or groups of Member States of the CND can also request the commission to change the status of a substance if the request is accompanied by proper studies. The only difference between the modifications process of the 1961 and 1971 conventions is that, while the first one requires a simple majority, the second one requires a two third majority. To introduce modifications in the 1988 convention is quite similar, but in this case, it is the INCB and not the WHO the one in charge of making the suggestions to the CND¹⁴².

¹⁴¹ David Bewley-Taylor, 'Challenging the UN drug control conventions: problems and possibilities' (2013) 14(2) IJDP 171

¹⁴² David Bewley-Taylor, 'Challenging the UN drug control conventions: problems and possibilities' (2013) 14(2) IJDP 171

Amendments are much more complicated than modifications, and require one State Party to formally request the modification of one of the conventions articles. The way to do it is not as different as in other types of conventions.

“Parties can notify the Secretary-General of a proposal for an amendment, including the reasoning behind the move. The Secretary-General then communicates the proposed amendment and the reasons for it to the Parties and to the Council. It is then the ECOSOC's decision to either call a conference to consider the amendment, or ask the Parties if they accept the amendment. If no Party rejects the amendment within 18 months after circulation by the Council, the amendment will come into force”¹⁴³. Nevertheless, and considering the strong defence that Member States such as the United States, China, Russia, Muslim Countries from Africa and Asia and some countries of the Latin American and the Caribbean region, make about the integrity of the three conventions, it is very difficult to believe that no country would present an objection or at least comments regarding a possible amendment.

The only case when one of the conventions was effectively amended occurred in 1972, after a conference convened in Geneva approved the text of a protocol that made several amendments to the 1961 convention. Although several things were changed and improved, in general terms it can be highlighted that issues such as the importance of treatment and rehabilitation for drug addicts and the importance of establishing demand prevention strategies were included¹⁴⁴. It is important to notice that through this changes States started to understand that the IDCR should not only be

¹⁴³ David Bewley-Taylor. ‘Challenging the UN drug control conventions: problems and possibilities’ (2003) 14(2) IJDP 171

¹⁴⁴ United Nations, ‘Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961’. (*United Nations*, 1972)
<https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_protocol_1961.pdf> accessed 18 March 2017.

focused on supply reduction through repressive strategies but also should include the importance of addressing the social and health aspects of the WDP.

If the conventions are in fact so difficult to change, then it may seem that countries wanting to introduce variations in the regime might face a very difficult challenge. However, the evolution of the regime might not come from a change in the three conventions which, as it has been established, was considered for decades the cornerstone of the international drug control system, but from the extension of the cornerstone.

The negotiations of the outcome document of UNGASS 2016 brought this debate to a next level. Countries such as Colombia, Portugal, Guatemala, Ecuador and the ones conforming the EU wished to mention that the three conventions and the Universal Declaration of Human Rights were the cornerstone of the regime, which was not accepted by most Member States of the CND. The main argument to reject this proposal was not against the importance of Human Rights while establishing strategies to deal with the WDP, but to prevent the possibility that States started to go beyond the scope of the three conventions arguing that their strategies were inside the scope of the Universal Declarations of Human Rights. Finally, States decided to keep agreed language reassuring the commitment that *“that all aspects of demand reduction and related measures, supply reduction and related measures, and international cooperation are addressed in full conformity with the purposes and principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights”*.

4.3 Penal provisions, sanctions and alternatives to imprisonment in the Three International Drug Control Conventions.

As it has already been mentioned, the strongest argument from some States against the current international legal framework against drugs and especially against the Three International Drug Control Conventions is that they are based on a “punishable basis”. The countries willing to change or

review the three conventions established that the current strategies have been created to persecute the offenders, including the ones who need a special health care to “be cured” from addiction, and not to treat them to focus on the “human dimension” of the WDP.

It is clear that countries agreed in 1961, 1971 and 1988 that drug related crimes and offenses should have consequences, even (and maybe specially) penal consequences. But these conventions are part of an evolution of the way States consider the WDP and were conceived as a framework for the Member States to apply the strategies they considered more convenient. The question that needs to be answered is if the three conventions do not allow Member States to implement strategies different to punishment, or if in reality Member States have focused too much in the theoretical “punishable basis” of the conventions without noticing that these present other possibilities. To understand this, an analysis of the penal provisions and dispositions is necessary to understand the different possibilities the three conventions give to Member States that are not necessarily imprisonment to all the actors involved in the crime chain.

A.- Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol

Article 36°

Penal Provisions

a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an

alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.

The Single Convention of 1961 is probably the “hardest” convention regarding punishment for drug related crimes offenders. There is still a debate regarding how far the term “possession” goes, because it could also be interpreted as possession for personal use. Nevertheless, according to the "Comments to the Single Convention on Narcotic Drugs of 1961" prepared by the Secretary-General of the United Nations in accordance with paragraph 1 of resolution 914 D (XXXIV) of the ECOSOC of 3rd August 1962, there is the view that the term "possession" in the context of paragraph 1 does not include possession for personal consumption. In any case, Parties not sharing that opinion do not need to consider possession for personal consumption as a "serious" offense punishable with imprisonment or other penalties of deprivation of liberty.

Bearing this in mind, the possibility to establish alternatives to imprisonment for possession for personal consumption does not contradict the Single Convention of 1961, considering also that “consumption” is not listed in article 36 as a punishable offense.

Regarding what can be understood as “adequate punishment”, and going back one more time to the comments made by the Secretary General, paragraph 1 from article 36 requires, in a general way, that if the offenses are serious, they must be punished "in an appropriate manner". The Plenipotentiary Conference which negotiated the Single Convention of 1961 did not accept a proposal to demand "severe" punishment, because, among others, *“the degree of severity of a penal sanction required in different countries to achieve its social purpose might differ widely; what could be an adequate penalty in one State might not be considered severe in another State”*¹⁴⁵.

¹⁴⁵ United Nations, 'Commentary on the Single Convention on Narcotic Drugs, 1961' (*United Nations*, 1962)

However, it is considered that, to ensure that penalties in the fight against serious drug related offenses are "adequate", they must be severe enough to have the desired deterrent effect in every special condition of the country in which they are imposed. This idea is also implicit in the requirement that an "adequate" form of punishing "serious offences" should include "imprisonment or other penalties of deprivation of liberty". For example, the mere imposition of fines would in no case constitute an "adequate" punishment for serious drug related offenses.

Regarding the terminology "imprisonment", in its broad sense, it includes all penalties of deprivation of liberty. The inclusion of "other penalties of deprivation of liberty" by the Plenipotentiary Conference seems to have made it clearer that not only internment in an institution that is technically a prison constitutes punishment "in an adequate form", but also in other places such as mandatory work fields or re-education facilities.

B.- Convention on Psychotropic Substances of 1971

Article 22°

Penal Dispositions

1. a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

The main purpose of Article 22 of the Convention of 1971 is to include in national legislation penalties that have an effective deterrent effect in relation to illicit drug trafficking offenses. It seeks for all forms of participation in such crimes to be established in national criminal law and that illicit traffickers cannot avoid trial and punishment for technical reasons of lack of local jurisdiction¹⁴⁶.

<https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_single_convention_1961.pdf> accessed 18 March 2017.

¹⁴⁶ United Nations, 'Commentary on the Convention on Psychotropic Substances of 1971' (United Nations, 1971)

The seriousness of an offense under the provisions of article 22 shall be decided mainly in the light of its potential to cause, directly or indirectly, damage to the health of persons other than the offender, in particular persons residing in countries other than that where the crime was committed.

This article is intended to combat illicit drug trafficking and not to require the punishment of those who misuse any controlled substances. The only acts referred to in subparagraph (a) that should be treated as punishable offenses are those committed "intentionally".

It is only required for serious offenses to be liable to adequate punishment. Sanctions must be adequate to achieve their social objectives, which is to produce the deterrent effect. In some cases, countries may need to establish different levels of severity. A sanction that is not severe enough in one country can be considered adequate or even too strict in another, but the penalty is only "adequate" within the meaning of subparagraph (a) if it includes imprisonment or other penalties of deprivation of liberty.

Notwithstanding the preceding sub-paragraph, when abusers of psychotropic substances have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to punishment, that such abusers undergo measures of treatment, education, aftercare, rehabilitation and social reintegration in conformity with paragraph 1 of article 20.

This subparagraph establishes that state parties may only replace criminal sanctions for treatment measures in the case of persons who have misused psychotropic substances and not drugs controlled under the Single Convention. It can be understood that the substitution of criminal sanctions for treatment measures under paragraph (b) is justified only if it can

<https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_Convention_1971.pdf> accessed 25 March 2017>

reasonably be expected that the abuser will not only be cured of his dependence, but that he will not commit again a serious felony.

C.- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

Article 3.

Offences and sanctions

4. a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

According to the "Comments to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988"¹⁴⁷, the relevant provisions of the 1961 and 1971 instruments specify that serious offenses should be punished properly, especially with imprisonment or other terms of deprivation of liberty. It is believed that the negotiators of the 1988 Convention were determined to strengthen these provisions, beyond the scope of the earlier texts. The structure of article 4 gives priority to more severe penalties in subparagraph (a) and, as an exception, allows in subparagraph (c) less stringent sanctions in cases of minor infractions.

The sanctions contained in this paragraph are not exclusive or necessarily cumulative. These sanctions, alone or in combination, are among those that could be applied.

b) The Parties may provide, in addition to conviction or punishment for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.

c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or

¹⁴⁷ United Nations, 'Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (United Nations, 1988)
<https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf> accessed 18 March 2017.

punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

While the 1961 and 1971 Conventions contain provisions on additional and alternative measures to imprisonment for persons who abuse drugs, subparagraphs (b), (c) and (d) of the 1988 Convention extend the scope to those who have committed crimes related to drugs in general, whether or not they are addicts.

They also introduce distinctions based on the seriousness of the offense: for serious offenses under article 3, paragraph 1 of the 1988 Convention, measures of treatment, education, among others, can only be applied in addition to the sanction or punishment. In case of minor offenses under article 3, paragraph 1, and also for offenses committed for personal consumption under article 3, paragraph 2, such measures may be applied as an alternative to sanction or punishment.

The fact that subparagraphs (b), (c) and (d) do not limit the application of additional or alternative treatment and care measures only to drug abusers, seems to indicate that such measures may go beyond the context of the medical and social problems of addicts. Thus, these measures can be used in a broader context of general delinquent treatment measures designed to reduce the likelihood of recidivism. In practice, drug addicts are, however, the main target group for such measures in the context of drug-related crimes.

Subparagraphs (b), (c) and (d) refer to prosecution and conviction as the stages in which additional or alternative measures may be available. It should be noted, however, that the link between the criminal justice system and the treatment system could also be used at other stages of the criminal process, including the stage of the judicial process or at the stage of

imprisonment such as transfer from a prison to a treatment institution or to a therapeutic community in certain circumstances.

5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:

- a) The involvement in the offence of an organized criminal group to which the offender belongs;*
- b) The involvement of the offender in other international organized criminal activities;*
- c) The involvement of the offender in other illegal activities facilitated by commission of the offence;*
- d) The use of violence or arms by the offender;*
- e) The fact that the offender holds a public office and that the offence is connected with the office in question;*
- f) The victimization or use of minors;*
- g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;*
- h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.*

Although the previous instruments use the notion of "serious crimes", the circumstances which establish the seriousness of a crime are not identified. Paragraph 5 provides such guidance by presenting a non-exhaustive list of relevant factual circumstances. It is for the parties to ensure that their courts and other competent authorities (for example, special courts used by some States for drug-related offenses) can take such circumstances into account when pleading guilty. Of course, it must be understood that no special legislation is required if the courts or other authorities already have the practice of considering these circumstances, and this article was not

attempted to determine the effect that those circumstances would have on the sentence imposed.

6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

This paragraph seeks to give some flexibility to the strict application of Article 3 by accepting the possibility of granting discretionary powers to public prosecutorial authorities to facilitate a rational policy of prosecution, where concessions granted to persons occupying the lower echelons of organized crime organizations would allow investigative agencies to identify and prosecute those who occupy the upper strata. The fundamental aspect, however, is the need to “*maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences*”.

11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

This paragraph, like article 36, paragraph 4, of the 1961 Convention, was not conceived as an additional safeguard clause. It ensures that no provision of Article 3 is considered of automatic application. Although it requires the parties to typify the crimes, these and their sanctions will be part of the national legal system and will be used within the framework and terminology of that law.

Considerations on the application of article 3, paragraphs 4 to 11, of the 1988 Convention

Paragraphs 4 to 11 are mostly designed to ensure that offenses of illicit trafficking, especially those established in paragraph 1, should receive proper attention from the judicial authorities and the public prosecutor of each state party. The drafting style used for this purpose gives the appropriate authorities of each State considerable flexibility for the exercise of their own judgment in determining how best to achieve the relevant objectives in the light of different legal, moral and cultural traditions. This inherent flexibility, in turn, is amplified in the provisions of article 24, which allows for stricter or more stringent measures than those provided by the Convention if deemed convenient or necessary for the prevention or suppression of illicit drug trafficking. This can be very useful, for example, when considering the list of aggravating factors contained in paragraph 5.

4.3.1 General remarks

As it has been established, the Three International Drug Control Conventions give enough flexibility to the Member States to apply strategies and methods as an alternative or complement of punishment, such as alternative to imprisonment. These possibilities are established specially for possession of drugs for personal consumption, for consumption and for non-serious crimes committed by addicts.

However, if the crime or offense committed is indeed serious and it has not been committed under the influence of narcotics, the three above mentioned international documents state that an adequate punishment is necessary, and any other alternative such as treatment, rehabilitation and re-education has to be applied together with imprisonment. The 1988 convention gives some orientation to Member States regarding what could be considered a serious crime or offense through a non-exhaustive list of aggravating circumstances. Thus, it is the responsibility of the parties to ensure that their courts and other competent authorities can consider the circumstances which give rise to serious crimes by declaring guilty.

Also, the fact that the 1988 Convention does not limit the application of additional or alternative treatment and care measures to drug abusers and addicts, even if they constitute the main target group of such measures, seems to indicate that these alternatives can go further of the context of the medical and social problems of drug addicts and can be seen in the broader context of delinquent treatment measures generally designed to reduce the likelihood of recidivism.

Another important issue that has to be taken into account in order to demonstrate the flexibility of the Three International Drug Control Conventions is that most of the articles established that every strategy or method a State has to apply in accordance with the international framework is subject to constitutional limitations of the Members, which means that States are capable of establishing its own legal framework in order to implement their own strategies to tackle the World Drug Problem.

5. Review of the current positions regarding how to address the WDP

Previous chapters we have sought to review the most outstanding aspects of the IDCR, as well as its long evolution to understand the reasons why today the regime is consigned in this way. Once this is done, it is opportune to explain the current controversy that exists around the regime, as well as the main and conflicting positions of the different States. This is precisely what justifies trying to determine how flexible the IDCR is in order to accommodate positions so distant from each other.¹⁴⁸

*As the twentieth century closed, the drug issue appeared among the most paradoxical confronting the world community. Hardly a nation on earth could claim exemption from substance abuse. In addition to a public health problem possessing international dimensions, drugs posed a threat to national, social, cultural and economic security. However, the “drug wars” created casualties among a variety of innocent victims. Furthermore, pharmacological advances created unprecedented opportunities for relieving physical and psychological maladies. Demarcating and managing the boundaries between licit and illicit, ethical and unethical, profitable and marginal, moral and pragmatic, became increasingly problematic. Maneuvering for political, strategic, regulatory, and economic advantage occurred in an environment fraught with the sort of cultural friction, material interest, and dynamic tension between conflict and cooperation that have marked drug diplomacy since the beginning.*¹⁴⁹

William McAllister summarizes in a very precise way the dichotomy in which the different States found themselves at the end of the 20th century. To what has been mentioned by this author's, it could be added the pressure of civil society in relation to the application of less restrictive drug policies. It is worth noting, again, the element of morality versus pragmatism, especially

¹⁴⁸ For further information on the position of States at the 2016 Special Session of the General Assembly, including those regarding the 2009 Political Declaration, see the official records: A/S-30/PV.1, A/S-30/PV.2, A/S-30/PV.3, A/S-30/PV.4, A/S-30/PV.5, A/S-30/PV.6. <https://www.unodc.org/ungass2016/> accessed 17 November 2017

¹⁴⁹ William McAllister, “Drug Diplomacy in the twentieth century. An international Story”. (Routledge 2000) 240

understanding that the behaviour of the States in relation to the WDP is the result of an evolution that had this confrontation as important element. It is also worth highlighting, regarding ethical and moral terms, how the States changed their position in relation to the different interests that appeared, which means, States behave with pure pragmatism. For example, as indicated, during the negotiation of the 1971 convention, developed States sought to curb controls on substances produced in laboratories through the pharmaceutical industry. Today, however, the same States are pushing for more controls, mainly due to the public health problem caused by the new psychoactive substances.

One example of this situation is the new attitude taken by the United Kingdom, a country that together with the United States fervently defended the lax controls for substances coming from laboratories. Nowadays, at the same time that they press for stronger controls, they promote that drug addicts, to alleviate the effects of their addiction, consume alternative substances that in many cases are granted by the same governments. Interestingly, the United Kingdom Pharmaceutical Industry is among the leading manufacturers of these substances.

Regardless of the possible reasons that have led the States to support the positions they have today, what is relevant for the purposes of this thesis is that, at present, there is no consensus on how to address the WDP, fundamentally because of the results derived from the War on Drugs. During the historical review of the evolution of the IDCR it has been possible to appreciate the evolution that the current regime has had until its outlet in the so-called War on Drugs and which have been some of its results or lack of them. As a next step, it is necessary for the objectives of this research, to further analyse the current positions of the main international actors at a moment of breakdown of the IDCR and, particularly, the different positions that exist around the best strategies to be applied to combat the WDP.

A key aspect to understand the different approaches that can exist in relation to the “best way” to tackle the WDP comes from the fact that there

are multiple factors that must be observed and addressed by States and International Organizations at the same time: demand reduction, supply reduction, harm reduction, international cooperation, human rights, among others. Drug trafficking and related crimes are characterized for having a great number of dimensions that must be addressed in a comprehensive way. One of the biggest issues that is making difficult for States to find a single-track approach is that they have been focusing only in some aspects of the problem, those that affect them the most.

5.1 Particular interests of States reflected in the International Agreements on Drugs

Considering that States have different priorities regarding the fight against the WDP, but also bearing in mind that international cooperation is essential to address this issue effectively, the international community had the challenge of reflecting all different priorities and strategies in documents that could be agreeable for every State. For example, in 2009 States agreed on the “Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the WDP”, adopted during the high-level segment of the fifty-second session of the Commission on Narcotic Drugs and by the General Assembly in its resolution 64/182¹⁵⁰. In this document, States committed themselves to promote a society free of drug abuse in the framework of the Three International Drug Control Conventions, recognizing, one more time, that these instruments constitute the cornerstone of the international drug control system. Bearing this in mind, States have been designing strategies and an entire plan of action towards the application of the traditional world drug policies: law enforcement, supply and demand reduction and the fight against other drug related crimes such as money laundering.

In the 2009 Political Declaration, year 2019 was established as a target date for States to eliminate or reduce significantly and measurably:

¹⁵⁰ United Nations General Assembly ‘International cooperation against the WDP’ (18 December 2009) UN Doc A/RES/64/82

- (a) The illicit cultivation of opium poppy, coca bush and cannabis plant;
- (b) The illicit demand for narcotic drugs and psychotropic substances; and drug related health and social risks;
- (c) The illicit production, manufacture, marketing and distribution of, and trafficking in, psychotropic substances, including synthetic drugs;
- (d) The diversion of and illicit trafficking in precursors;
- (e) Money-laundering related to illicit drugs.

Nevertheless, some countries, such as Canada, Mexico, Uruguay and Ecuador, supported by the EU and the civil society, started to question if it was possible, after many years of fighting the war against drugs, to “achieve a society free of drug abuse”, or if this was just a utopian idea. In the same line, these countries considered that the Three International Drug Control Conventions (the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol; the Convention on Psychotropic Substances of 1971; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988) were not capable of dealing with what they called “evolving realities”, making reference to the growing importance of dealing with the social and health aspects of the WDP. So, they decided to question the role of the three conventions as the only cornerstone of the international drug control system.

Considering all this, these countries started to question the entire drug control regime, basing their position in three main points: to achieve a society free of drug abuse is in fact a utopian goal; the IDCR has to be reviewed to recognize to focus mainly on the social and health aspects of the WDP; the law enforcement and punitive policies have failed. These actors are now claiming that it is time to build a new consensus on the WDP and especially on how to face it, considering Human Rights and more flexible laws as a basis of this consensus. Bearing this in mind, they stopped considering necessary to achieve the objectives established in the 2009 Political Declaration.

This position is based on the fact that there are diverse complexities when it comes to addressing the WDP, mainly regarding the human impact that the policies that States have been implementing have. Bearing this in mind States questioning the regime consider that the current policies are not human based and balanced enough when it comes to addressing production, trafficking and consumption. Therefore, the policies are not fulfilling the mandate they should have: to promote the wellbeing of individuals around the world.

It cannot be denied that statistics play in favour of this position. The UNODC World Drug Reports, since 2009, shows clearly that States are not closer of achieving the objectives established in the 2009 Political Declaration¹⁵¹. After 10 years, the illicit cultivation of opium poppy, coca bush and cannabis plant has not decreased; the illicit demand for narcotic drugs and psychotropic substances, as well as the drug related health and social risks are the same in some cases and have increased in others; the illicit production, manufacture, marketing and distribution of psychotropic substances, including synthetic drugs, has become one of the biggest health related problems specially in the developed countries; the diversion of and illicit trafficking in precursors continues to be a huge problem; and money laundering related to illicit drugs continues representing a very lucrative business for organized crime organizations.

Starting from the vision that the international community has recognized the importance of having a multilateral approach when addressing the WDP, States questioning the IDCR pushed towards the organization of the UNGASS 2016, hoping that it would be an opportunity to make amendments and to establish new priorities in comparison to the objectives set up in 2009. States agreed 113 operational recommendations on how to tackle the WDP in the UNGASS 2016 Outcome Document, divided in seven thematic chapters. One of the main achievements for the States questioning the current international drug control system is that they managed to divide the operational recommendations in more than the traditional three pillars

¹⁵¹ United Nations Office for Drugs and Crime, 'World Drug Report 2018'. (UNODC, 2018) <<https://www.unodc.org/wdr2018/>> accessed 1 February 2019

established in the 2009 Political Declaration, which were Supply Reduction, Demand Reduction and International cooperation. The seven thematic chapters of the UNGASS 2016 are the following:

1. *Demand reduction and related measures, including prevention and treatment, as well as other health-related issues;*
2. *Ensuring the availability of and access to controlled substances exclusively for medical and scientific purposes, while preventing their diversion;*
3. *Supply reduction and related measures; effective law enforcement; responses to drug related crime; and countering money laundering and promoting judicial cooperation;*
4. *Cross-cutting issues: drugs and human rights, youth, children, women and communities;*
5. *Cross-cutting issues in addressing and countering the WDP: evolving reality, trends and existing circumstances, emerging and persistent challenges and threats, including new psychoactive substances, in conformity with the Three International Drug Control Conventions and other relevant international instruments;*
6. *Strengthening international cooperation based on the principle of common and shared responsibility;*
7. *Alternative development; regional, interregional and international cooperation on development-oriented balanced drug control policy; addressing socioeconomic issues¹⁵².*

The entire current international debate can be traced back to the decision to convene UNGASS 2016 and the adoption of its outcome document. It is a fact that the document was agreed upon by all the participating States; but while the motivation of several countries was to replace the objectives agreed in 2009 with the document resulting from UNGASS 2016, the objective of the countries that defend the existing regime was to accelerate their fulfilment.

How is it that a document that was accepted by all parties can cause so much controversy around its application? This can be answered due to the discourse that has been generated after its adoption. Countries that question the current international regime point out that the document resulting from UNGASS 2016 is the most recent and comprehensive

¹⁵² United Nations General Assembly 'Our joint commitment to effectively addressing and countering the world drug problem' (19 April 2016) UN Doc A/RES/ S-30/1

consensus and, therefore, it means the last milestone with respect to how the WDP should be addressed. In this regard, they point out that the international community should focus on compliance with the operational recommendations, which go beyond the 2009 objectives. On the other hand, the countries that defend the current regime point out that the 2009 Political Declaration and the Document resulting from UNGASS 2016 are complementary and mutually reinforcing, so one cannot be applied independently from the other. This position is reinforced by the fact that the document resulting from the UNGASS 2016 recognizes the validity of the 2009 Political Declaration.

States questioning the regime indicate that the objectives of the 2009 Political Declaration lost validity in 2019 because they were not fulfilled in the established target date. Therefore, they are indicating that the main reference document must be the one that resulted from UNGASS 2016, and that States should seek to apply their operational recommendations. However, the document resulting from UNGASS 2016 indicates in its preambular section the following: *“We reaffirm our commitment to implementing effectively the provisions set out in the Political Declaration and Plan of Action, mindful of the targets and goals set therein, as well as to addressing the general challenges and priorities for action identified in the Joint Ministerial Statement adopted at the high-level review in March 2014”*¹⁵³.

The same document, again in its preamble, indicates the following: *We reaffirm the need to mobilize adequate resources to address and counter the WDP and call for enhancing assistance to developing countries, upon request, in effectively implementing the Political Declaration and Plan of Action and the operational recommendations contained in the present document.* Was reaffirming the 2009 Political Declaration in the 2016 UNGASS document only a strategy to achieve its approval? This seems to be the case, given that the countries that defend the 2016 UNGASS

continue to deny the validity of the 5 objectives of the 2009 Political Declaration described above.

5.2 Impairment of the role of CND, UNODC and INCB

The parties trying to challenge the current IDCR are aiming to shift the policy-shaping and decision-making process on drug control to the UN General Assembly and to disseminate the drug-related issues between different UN entities responsible for health, human rights and development. They have tried to set the UNGASS 2016 outcome document follow-up policy framework by assigning specific tasks and mandates to the different UN bodies¹⁵⁴, disregarding the central policy-making role of the CND as well as the prime responsibility for drug control matters of the UNODC and INCB, elements that have been recognized in several international documents¹⁵⁵. By presenting drafts resolutions both in Vienna, New York and Geneva, they wanted to undertake all activities related to post-UNGASS matters, including revision of UNGASS recommendations and conducting a High-Level Meeting in this regard.

Another issue on this area was that the presentation of a draft resolution in New York which called on the Secretary General to strengthen cooperation among all relevant UN entities dealing with the WDP with the UNODC and INCB not even singled out as having prevalence over others. The proposal tried to assign the CND only a pure technical and subsidiary task that consisted in submitting a report on what was supposed to be a UNGASS follow up at the 73rd GA session in 2018, proposal that did not fly.

The problem with this proposal was that the diffusion of the drug-related mandates between different UN bodies would impede the comprehensive and balanced approach to addressing the WDP that the CND oversees. For

¹⁵⁴ Martin Jelsma, 'UNGASS 2016: Prospects for Treaty Reform and UN System-Wide Coherence on Drug Policy' (2017) 10(1) Journal of Drug Policy Analysis 1

¹⁵⁵ Ernesto Samper, 'UNGASS 2016 y el nuevo paradigma sobre el problema mundial de las drogas' (2017) 29(2) Revista Desafíos 353

instance, WHO would have dealt with drug demand reduction issues in isolation from drug supply reduction issues. Development agenda would have been tackled separated from law-enforcement efforts to counter drug cultivation, production and trafficking. The only body that can provide a complex and balanced approach to all aspects of the WDP has been the CND, leading the coordination's with other UN relevant organizations.

5.3 Role of the European Union

The EU, both in the negotiations of the UNGASS 2016 Outcome Document and the 2016 General Assembly Resolution entitled "International cooperation to address and counter the WDP", has shown a middle point between the 2 extreme existing positions. Without wishing to break with the IDCR and respecting the documents that already have the consensus of the International Community, the EU has been advocating for the inclusion of more issues and topics related to Human Rights and Health care. On this regard, the EU has also been trying to include a new terminology called "harm reduction", but they have failed in doing so because countries outside Europe argue that there is still not an agreed definition on what "harm reduction" is.

Nevertheless, even though the EU shares the same opinion of Canada, Mexico, Uruguay, Ecuador, among others, regarding the importance of addressing the health and social issues of the WDP, they still consider the Three International Drug Control Conventions as the cornerstone of the International Drug Control System, although they assign a similar importance to the Universal Declaration of Human Rights.

Undoubtedly, the EU, promoted especially by Portugal, attaches greater importance to the document resulting from the UNGASS 2016 than to the Political Declaration of 2009 and its Plan of Action. However, the aforementioned European integration bloc has expressed in Vienna the importance of reaching consensus in order to bring the different positions closer, considering that the WDP contains different edges that each State

must address differently according to its own problems and national frameworks. In this regard, just as the problems of the EU are mainly focused on consumption and public health aspects related to the WDP, at the same time they cooperate with less developed countries in addressing the problem of production, for example through Alternative Development programs in Peru, Colombia and Thailand.

5.4 Countries defending the current international drug control strategies

The States defending the current international drug control strategies as well as the Three International Drug Control Conventions as the cornerstone of the international drug control system and the validity of the Political Declaration and its Plan of action are still a large majority. Among those countries, we can find the whole African Union, the Asian Group, several Latin American countries such as Peru, El Salvador, Argentina, Chile, countries from Western Europe, Russia, etc. These countries argue that the reason why the “War against Drugs” has not been won yet is because countries have not been applying the current strategies and the existing documents in an effective way.

On the one hand, these likeminded countries do not deny that realities have been evolving since the Three International Drug Control Conventions were negotiated. On the other hand, they consider that these documents give enough flexibility to the countries to adapt to these evolving realities and allow States to implement the conventions in different ways accordingly to their own realities. For example, even though some countries have very strong penalties for drug related crimes, the three conventions call upon States to implement penalties that are proportional to the crimes committed. The three conventions even recognize the possibility of establishing alternatives to imprisonment that include programs to help the people under the crime chain.

Even though the countries wishing to change the way the international community is facing the WDP achieved to include many of their positions in

the UNGASS 2016 Outcome Document, they failed to undermine the validity of the three International Drug Control Conventions as the cornerstone of the International Drug Verification Regime as well as the Political Declaration and its Plan of Action. Nevertheless, some countries such as Colombia, Guatemala, Mexico, Uruguay, Ecuador, Portugal and some of the EU showed that they will not give up in trying to build a new paradigm on this regard. This way, they are showing the International Community how their behaviour is going to be towards 2019.

It has to be mentioned that the UNGASS outcome document was not supposed to replace the 2009 Political Declaration but to support the implementation of the three pillars established in this document: demand reduction, supply reduction and international cooperation. Nevertheless, the Draft Proposal tried to make the CND to establish working groups on seven thematic areas corresponding to thematic chapters of UNGASS Outcome Document,¹⁵⁶ which would have focus the work of the CND in the implementation of the UNGASS outcome document instead of in the 2009 Political Declaration.

So, summarizing, the position of the countries defending the current international strategy is that there is no need to break the system but to implement the existing tools in a positive way. These countries do not deny the importance of health and social related issues, human rights, etc., but they seek for a balance between these topics and law enforcement and supply and demand reduction.

In that sense, the strategy to combat illicit drug trafficking has been based on a war against transnational organized crime that was financed from this illicit activity. This war has led to extremes such as military operations against small farmers of illicit crops, the chemical spraying of crops linked to the production of drugs, the imprisonment of users and small distributors and even the death penalty in some countries. All these strategies were allowed in the framework of the Three International Drug Control

¹⁵⁶ United Nations General Assembly 'International cooperation against the WDP' (18 December 2009) UN Doc A/RES/64/82

Conventions, although there is no consensus regarding their success. Nevertheless, the three conventions do not say that States are forced to apply these punitive strategies. The three conventions give a huge framework of possibilities to the States based on the principle of respect to human right. Thus, States are allowed to apply alternatives to imprisonment instead of incarceration, the same as they can apply Alternative Development Programs instead of chemical spraying and military interventions against farmers. The global problem of drugs is so particular and changing that pointing out that the same type of strategy will work in all cases is unthinkable.

Although the questionings that have been made to the regime have occurred mostly in the multilateral sphere, there are clearly examples that go beyond the political and academic debate that have been transferred to specific policies that mark a break with the regime. In this chapter, in a succinct way, an analysis of the main positions that have been discussed in relation to the regime has been presented. This situation of questioning has been amplified by the application of policies that break the IDCR, such as the legalization of the cannabis market for recreational purposes. This situation will be analysed in greater depth in the following chapters. Once the characteristics of the IDCR have been established, as well as the different positions that exist around the main documents that contain the commitments assumed by the States, concrete study cases will be presented in this thesis that demonstrate the current crisis in which the regime finds itself, to elucidate the real flexibility of the regime. These cases will serve to understand if the IDCR flexibility is the real problem or if in fact certain States seek to break with the regime due to interests of another nature.

6. Bolivia: withdrawal and re-accession to the Single Convention of 1961

The case of Bolivia has become a very interesting example of how a State found a way to go around one of the Three International Drug Control Conventions in order to be able to make a reservation many years after the country obliged itself to all the articles of the 1961 Single Convention. Bolivia never intended to break with the system but to bring to it one special social condition that became important at the beginning of this century, which was the social vindication of the Bolivian indigenous people. Although it could be argued that Bolivia “cheated” on the international law of treaties and on the Single Convention of 1961, at the end the country found a way out of this problem which allowed it to remain in the system but with a huge difference in comparison to other countries.

In 2011, Bolivia denounced and then re-acceded with reservations to the 1961 Single Convention on Narcotic Drugs amended by the 1972 Protocol. The reservation was aimed at allowing coca leaf chewing and traditional consumption in Bolivia, as well as allowing the cultivation and trade of coca for these purposes, which is explicitly prohibited in the said convention. This situation raised a series of objections and criticisms about the validity of the procedure followed by Bolivia and especially about the validity of the reservation, considering that some pointed out that the reservation went against the objectives and purposes of the convention. However, the reservation was allowed by the CND based on the non-objection of a large number of States Parties and also because of some of the provisions of the 1961 Convention itself.

It should be noticed that Bolivia never had the intention to break with the IDCR but to try to insert into it some very particular provisions that would allow Bolivian citizens to continue with an activity that they have been developing since centuries. Bolivia, like other countries in the Andes such as Peru, Colombia and Ecuador, has a significant practice of traditional and

cultural use of coca leaves¹⁵⁷, which includes chewing or "akulliku". This tradition dates back at least 5000 years.

The population of Bolivia is composed of various indigenous groups. The census carried out in 2012 indicated that 41% of the population identifies itself as indigenous, mainly Quechua or Aymara, while in 2001 this figure reached more than 60%. It is precisely the Aymara and Quechua communities that practice the most the chewing of coca leaves for traditional reasons, although its use for other purposes such as "altitude sickness" has become more and more widespread.

The Single Convention of 1961 establishes, in the first paragraph of article 49, that a *"party may at the time of signature, ratification or accession reserve the right to permit temporarily different activities such as Coca Leaf chewing"*. Nevertheless, it also establishes that

"the activities mentioned in paragraph 1 may be authorized only to the extent that they were traditional in the territories in respect of which the reservation is made, and were there permitted on 1 January 1961". Finally, same article establishes that *"Coca leaf chewing must be abolished within twenty-five years from the coming into force of the Convention"*. Article 26 of the convention establishes that *"The Parties shall so far as possible enforce the uprooting of all coca bushes which grow wild. They shall destroy the coca bushes if illegally cultivated"*, while also states that *"If a Party permits the cultivation of the coca bush, it shall apply thereto and to coca leaves the system of controls as provided in article 23 respecting the control of the opium poppy"*. In that line, article 23 establishes that a *"party that permits the cultivation of the opium poppy for the production of opium shall establish, if it has not already done so, and maintain, one or more government agencies"*

to carry out the following functions:

- *The Agency shall designate the areas in which, and the plots of land on which, cultivation of the opium poppy for the purpose of producing opium shall be permitted.*
- *Only cultivators licensed by the Agency shall be authorized to engage in such cultivation.*

¹⁵⁷ Joyce Wyels, 'The cocoa crux: it has a long history of traditional and medicinal uses, and the backing of Bolivia's head of state, but can coca exist without cocaine?' (2006) 58 (6), *Americas* 8

- *Each license shall specify the extent of the land on which the cultivation is permitted.*
- *All cultivators of the opium poppy shall be required to deliver their total crops of opium to the Agency. The Agency shall purchase and take physical possession of such crops as soon as possible, but not later than four months after the end of the harvest.*
- *The Agency shall, in respect of opium, have the exclusive right of importing, exporting, wholesale trading and maintaining stocks other than those held by manufacturers of opium alkaloids, medicinal opium or opium preparations. Parties need not extend this exclusive right to medicinal opium and opium preparations.*

Bolivia deposited its adherence instrument to the 1961 Single Convention on September 23, 1976, without any reservations. It should be noticed that Bolivia did so during the military dictatorship of Hugo Banzer, who is remembered for applying very restrictive policies against civil rights. Therefore, it is understandable that he did not put into consideration the rights of indigenous people while entering the IDCR. After his government, and until 2005, Bolivia never showed any sign that the country was not trying to comply with the provisions established in article 49 of the convention. It is only from that year, after the arrival of President Evo Morales to power, that Bolivia changed its discourse around its drug policies. President Morales, one of the main leaders of associations of coca leaf producers, sought to reclaim the traditional use of the coca leaf and its various licit uses. Likewise, his Government has adopted various measures aimed at ensuring that the coca leaf is no longer subject to international control. It should be remembered that the coca leaf is listed on Schedule I of the 1961 Single Convention together with cocaine, heroin and other drugs and substances liable to abuse or that could be converted into narcotics¹⁵⁸.

According to Sven Pfeiffer, *“in practice, the national (Bolivian) drug policy (from Bolivia) shifted its focus from the eradication of illicit coca crops, to the promotion of the legal coca market, including by increasing the area of licit*

¹⁵⁸ Edgard Perez, ‘Validez de la reserva de Bolivia a la Convención Única de 1961 sobre estupefacientes enmendada por el protocolo de 1972’ (Master tesis, Academia Diplomática del Perú 2016)

coca crop cultivation and the implementation of alternative development projects in cooperation with coca farmers¹⁵⁹. In this line, and according to INCB:

Since 2006, the Government of the Plurinational State of Bolivia has taken a number of steps towards removing coca leaf from international control. In September 2006, the President of the Plurinational State of Bolivia addressed the General Assembly at its sixty-first session, calling on the international community to support his position to remove coca leaf from international control. On 9 January 2007, the Minister of Foreign Affairs of the Plurinational State of Bolivia addressed a letter to the Director-General of WHO requesting that Organization to take the measures necessary to implement a process of validation of the medical uses of coca leaf and their contribution to, as part of traditional medicine, public health in the Andean subregion. On 8 March 2008, in response to the launching of the report of the Board for 2007, the Permanent Mission of the Plurinational State of Bolivia to the United Nations forwarded a note to the Secretary-General on the position of the Government on the issue of coca leaf. During the high-level segment of the fifty-second session of the Commission on Narcotic Drugs, held in Vienna in March 2009, the President of the Plurinational State of Bolivia addressed the delegates, arguing for the removal of coca leaf from the IDCR and stating that the agreement to include coca leaf in Schedule I of the 1961 Convention had been a historical error and claiming that the agreement had been based on a study that was "neither serious nor scientific".¹⁶⁰

A key component of the change of the Bolivian position in the international spectrum in relation to the coca leaf was its change of constitution in 2009. The new Bolivian constitution, in force until today, indicates in article 384 that the State protects the original and ancestral use of coca leaf as cultural heritage, indicating that it is a renewable resource part of the country's biodiversity and that represents a factor of social cohesion.

¹⁵⁹ Sven Pfeiffer, 'Rights of Indigenous Peoples and the IDCR: The Case of Traditional Coca Leaf Chewing' (2013) 5(1) GJIL 287

¹⁶⁰ International Narcotics Control Board, 'INCB Report 2011' (*International Narcotics Control Board*, 2012)
<https://www.incb.org/documents/Publications/AnnualReports/AR2011/AR_2011_English.pdf>
Accessed 12 January 2017

6.1 Bolivian proposal to amend the Single Convention

As it has already been mentioned in this research, one of the biggest strengths of the current IDCR is that it is very difficult to change. After its constitution was approved, Bolivia notified the Secretary General of the United Nations, as depositary of the 1961 Convention, an application for an amendment related to the chewing of coca leaf¹⁶¹. Specifically, the proposal requested the elimination of subsection 1c and subsection 2e of article 49, which, as has already been mentioned, refers to the prohibition of the use of the coca leaf. In this way, Bolivia sought to eliminate the temporary element regarding allowing the chewing of coca leaves¹⁶². It is important to notice that Bolivia never intended to change the international control status of cocaine¹⁶³.

However, the amendment was challenged by 18 States Parties to the Convention, mainly from the Group of Eastern European States and Others (WEOG), as well as from Asia. The argument behind the opposition mainly focused on the fact that the amendment would affect the object and purpose of the 1961 convention and would generate a negative political precedent in the fight against drugs, as well as a precedent that would affect the international legal structure of the anti-drug system¹⁶⁴.

Bolivia's arguments stated that there was no scientific evidence proved that coca leaves chewing was harmful to health or that it created addiction. Although Bolivia recognized that the three conventions constitute the cornerstone of the international regime against the WDP, it also considered that the 1961 Convention did not take into account the rights of indigenous

¹⁶¹ John Witton and Jean O'Reilly, 'News and Notes: Bolivia to withdraw from UN Single Convention' (2011) 106(19), *Addiction* 1877.

¹⁶² Brian Ridel, 'I'd like to make a reservation: Bolivian coca control and why the United Nations should amend the Single Convention on Narcotic Drugs' (2017) 49 (3) *GWILR* 711

¹⁶³ Economic and Social Council, 'Proposal of amendments by Bolivia to article 49, paragraphs 1 (c) and 2 (e)' (8 August 1975) *Ecosoc doc E/2019/78*

¹⁶⁴ Martin Jelsma, 'El retiro de la prohibición de la masticación de la coca: Propuesta de Bolivia para modificar la Convención Única de 1961' (*Transnational Institute*, 6 July 2009) <<https://www.tni.org/es/publicacion/el-retiro-de-la-prohibicion-de-la-masticacion-de-la-coca-0>> accessed 24 February 2017

peoples or their sociocultural practices, emphasizing that these rights were recognized in other international instruments of the United Nations such as the declaration of the United Nations on the Rights of indigenous People, the Convention on Protection and Promotion of the diversity of cultural expressions of UNESCO, and also in United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Bolivia also argued that people who chew coca leaf based on ancestral practices should not be considered as criminals that violate international norm; that the coca leaf is not addictive; and that its consumption in its natural form does not cause harm to human beings¹⁶⁵.

It should be noted, as it was pointed out in the theoretical framework of this research, that Bolivia's first attempt to change the international regime was directly related to an attempt to broaden the cornerstone of the IDCR, as nowadays are doing countries like Uruguay, Canada, Mexico and the members of the EU. In this regard, by noting that there are other documents beyond the three conventions that should be considered, Bolivia sought to justify its attempt to amend the Convention, which was rejected precisely by those countries that today seek to include other reference documents, such as the Universal Declaration of Human Rights, as instruments of reference to apply drug policies.

The Bolivian case is also a very good example of how foreign policy is directly related to domestic structures and processes. Bolivia was promoting a change in the IDCR based on variations in its own domestic and national situation. Bolivia's new constitution represents the main element that motivates its foreign policy, seeking to align international law with domestic law to comply with the will of its people. Bolivia wanted to present a change in the internal circumstances of the country, suggesting the existence of a reality that had to be taken into account.

¹⁶⁵ Loreta Telleria Escobar, 'Bolivia y la despenalización de la hoja de coca como estrategia de cambio' (2013) 13 RLES 95

6.2 Withdrawal and re-accession of Bolivia to the Single Convention

After the proposed amendment failed, on June 29, 2011, Bolivia deposited with the Secretary General of the United Nations an instrument of withdrawal from the Single Convention of 1961. Article 46, sub item 2 of the convention reads as follows: *The denunciation, if received by the Secretary-General on or before the first day of July in any year, shall take effect on the first day of January in the succeeding year, and, if received after the first day of July, shall take effect as if it had been received on or before the first day of July in the succeeding year.* So, according to the terms established by the Convention itself, the denunciation took effect for Bolivia on January 1, 2012.

However, on December 29, 2011, Bolivia submitted to the Secretary General of the United Nations an instrument of accession to the Single Convention of 1961, which contained a reservation. This situation generated discomfort on various other countries and international actors, given that it could be understood that this was a way of evading the obligations acquired previously as part of the 1961 convention. This was also seen as an evasion of the Vienna Convention on the Law of Treaties, which states that reservations must be made when signing, ratifying, accepting, approving or acceding to treaty.

The reservation made by Bolivia reads as follows:

The Plurinational State of Bolivia reserves the right to allow in its territory: traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes, such as its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.

At the same time, the Plurinational State of Bolivia will continue to take all necessary measures to control the cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf¹⁶⁶.

¹⁶⁶ United Nations, 'Reservation made by Bolivia to the 1961 Single Convention on Narcotic Drugs' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-18&chapter=6&clang=en#EndDec> accessed 19 February 2017

In accordance with the Bolivian argument presented in its instrument of accession, that country submitted its reservation in accordance with article 50, paragraph 3 of the 1961 Convention, indicating that its accession was subject to the authorization of the reservation. This paragraph reads as follows:

A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraph 2 of this article or with article 49 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General's communication of the reservation concerned, this reservation has been objected to by one third of the States that have ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood, however, that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation.

According to this article and bearing in mind that the Bolivian reservation referred to an article on which, in principle, the reservations were not directly authorized, the Secretary General of the United Nations established a deadline for filing objections on January 10, 2013. As stated in the 1961 Convention, for the reservation to be authorized, it was required the number of objections to be less than one third of the number of States parties, which at that time was 61. Considering that there were only 15 States that objected the Bolivian reservation (Canada, Finland, France, Germany, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Portugal, Russia, Sweden, the United Kingdom and the United States), it was finally authorized. The re-accession of Bolivia became effective on January 11, 2013, with the aforementioned reservation and, pursuant to Article 41.2 of the Single Convention of 1961, entered into force again for Bolivia on February 10, 2013.

It should be noted that Bolivia oriented its international efforts towards a campaign to obtain the support of the international community to achieve its re-accession with a reservation, so that it would not be challenged by the States Parties. Among its main arguments during this period, Bolivia

indicated that the text of the 1961 Convention would not be affected and that its reservation would not affect other parts of the Convention.

The countries that presented their objection to the reservation established by Bolivia had arguments of different types. In general terms, with regard to the formal aspects, all considered that, in practice, Bolivia was establishing a reservation to a treaty that it had already ratified, which was contrary to international law¹⁶⁷. In this regard, they indicated that Bolivia intended to avoid well-established norms and mechanisms. While no one doubted Bolivia's right to denounce the 1961 Single Convention based on Article 50, they pointed out that said article should not be used to carry out a re-accession process, which could generate a very dangerous precedent for the future not only of the IDCR control but of any multilateral instrument subscribed by the States.

Other arguments were directed to indicate that the action of Bolivia went against the principle of "good faith" that should guide the action of the States on the basis of Article 26 of the Vienna Convention on the Law of Treaties, considering it was aimed at avoiding obligations that the country had already assumed in relation to Article 49 of the Single Convention of 1961. It should be noted that Article 26 of the Vienna Convention on the Law of Treaties contains one of the fundamental aspects of agreements between States: the principle by *Pacta Sunt Servanda*. The mentioned article reads as follows: *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

In that same line, the INCB, in its role as watchdog of the international drug control system, argued against the procedure followed by Bolivia. In a press release issued in 2011 INCB stated the following:

The Board is of the opinion that while this step by Bolivia may be in line with the letter of the Convention, such action is

¹⁶⁷ Björn Arp, 'Denunciation Followed by Re-Accession with Reservations to a Treaty: A Critical Appraisal of Contemporary State Practice' (2014) 61(2), NILR 141

contrary to the Convention's spirit. The international community should not accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation, in order to free themselves from the obligation to implement certain treaty provisions. Such approach would undermine the integrity of the global drug control system, undoing the good work of Governments over many years to achieve the aims and objectives of the drug control conventions, including the prevention of drug abuse which is devastating the lives of millions of people.

The international drug control conventions are the corner stone of international efforts to prevent the illicit production, manufacture, traffic in and abuse of drugs while at the same time ensuring that licit drugs are available for medical and scientific purposes. The almost universal adherence to these conventions is testimony to Governments' trust in the international drug control system and a pre-requisite for the treaties' effectiveness to prevent drug trafficking and abuse¹⁶⁸.

The case of Bolivia shows that the Single Convention of 1961, despite the flexibility it may have in establishing different strategies aimed at fighting the WDP, contained a limitation that was extremely problematic for a member State. In that sense, it could be said that it was too restrictive for the Bolivian interest to vindicate the traditional use of the coca leaf. Although Bolivia had already committed to the application of Article 49 in its entirety, it did so in a context that was very different from the one in 2009 in which President Morales took the decision to first withdraw and later re-accede the Convention.

This may lead to the conclusion that while the conventions, in general terms, continue to be the main reference document in the fight against the WDP, they have the limitation of not being able to adapt to certain aspects such as the social demands made in this case by Bolivia. While it is true that to this day there has been no other similar case at the international level, a clear precedent has been established that could lead other coca leaf-producing countries in the Andean region, or opium-producing countries in

¹⁶⁸ International Narcotic Control Board ' International Narcotics Control Board Regrets Bolivia's Denunciation of the Single Convention on Narcotic Drugs ' (5 July 2011) Press Release UNIS/NAR/1114

Asia, to follow a similar path, although none have indicated so far their interest in doing so.

6.3 Validity of the reservation

As it has already been said, International theory establishes that reservations are only allowed when they do not go against the main objective of the treaty. Several States argued that the Bolivian reservation could be put under this category, thus, it shouldn't have been accepted. But can practice overcome this theory? At the end, there has to be someone to decide if a reservation does or does not go against the objective of a treaty. In the case of the 1961 Single Convention, it was the right of the Member States to make this decision¹⁶⁹.

There are three reasons that could have convinced States not to oppose the Bolivian reservation. Firstly, it could be said that many States Parties to the 1961 Single Convention really believed that the reservation made by Bolivia did not go against the main objective of the treaty. Probably this applied to those States producing large amounts of poppy and coca leaf.

Secondly, the diplomatic efforts made by Bolivia payed off by convincing States to allow the Bolivian Government to continue with its strategy although they believed that the reservation was against the main objective of the treaty. The third reason, which probably was the main one, is that the majority of countries simply did not care about the reservation made by Bolivia or did not have enough resources to deal with something that was clearly not a priority for them. As Michael Wood established,

“When a state or international organization is formulating a reservation or a declaration, close attention will (one hopes) be paid to the matter. But unless they are parties to one of the relatively rare cases involving reservations (or

¹⁶⁹ Robert Zitt, 'Should I stay or should I go? Why Bolivian tactics and U.S. 'flexibility' undermine the Single Convention on Narcotic Drugs' (2016) 42(1), BJIL 525

interpretative declarations) that come before international courts and tribunals, most States seem not to concern themselves much with reservations and declarations made by others. This can be seen in their failure to react to reservations or declarations that may in some cases seriously threaten a multilateral treaty regime. There are, no doubt, many reasons for this. One must surely be that increasingly hard-pressed foreign ministries, including their lawyers, simply do not have the resources to devote to what can be a time-consuming and difficult matter. This seems to be the case for States, large and small”¹⁷⁰.

It should be noted that most States presenting objections against the reservation made by Bolivia were either States with huge interests in avoiding Bolivia to keep producing “legal” coca leaf, such as cocaine destination countries, or States with big delegations at the UN which are actually capable of handling a great amount of issues at the same time.

But even though the 15 countries objecting the reservation made by Bolivia either had direct interests in the matter or had enough people taking care of this issue, it is interesting to notice that they failed to convince other countries to follow their steps. Countries such as the United States, Russia, United Kingdom, among others, have the capability to bring States on board only with a phone call. A very good example of this situation is the resolution of the United Nations General Assembly which calls for lifting the US embargo against Cuba, which is approved every year. For many years, the US was able to convince States such as Marshall Islands, Federated States of Micronesia and Palau to either vote against or in abstention to the resolution. Bearing this in mind, it is interesting to notice that this was not the case in terms of establishing objections to the Bolivian reservation. Probably one of the reasons for this lack of diplomatic campaign was that the 15 countries opposing the reservation needed to do it because of political principles, but at the end knew that it was much better to have Bolivia on board even with the reservation.

¹⁷⁰ Michael Wood, ‘Institutional Aspects of the Guide to Practice on Reservations’ (2013) 24(4), EJIL 1099

7. Portugal: a history of success inside the framework of the Three International Drug Control Conventions

The approval by the Government of the “National Drug Strategy” which is now being published, is a clear sign of maturity in the political intervention regarding the complex problem of drugs and drug addiction.

The principles, objectives and strategic options that should guide the action to be taken over the next few years have now been accurately defined. This document is, therefore, a historic turning point in the structuring of a global policy faced with the problem of drugs and drug addiction on different fronts: from prevention to the fight against drugs and money laundering, from treatment to the social reintegration of drug addicts, from harm reduction to training and research.¹⁷¹

The case of the way in which Portugal has decided to face the problem of drugs is probably one of the most interesting to analyse, since it contains many of the elements that motivate this investigation. On the one hand, the Government of Portugal has been one of the most critical with respect to the existing regime, being one of the most radical countries in this regard within the EU¹⁷². Likewise, Portugal is one of the main proponents of the need to focus only on the document resulting from UNGASS 2016, leaving aside previous documents such as the Political Declaration of 2009. In this sense, Portugal, in the framework of the UN, has been *for the need to balance drug policies towards a human rights and public health based approach*¹⁷³. In its declarations in the framework of the CND, Portugal has

¹⁷¹ Government of Portugal, ‘National Drug Strategy’ (Government of Portugal, 1999) <http://www.emcdda.europa.eu/system/files/att_119431_EN_Portugal%20Drug%20strategy%201999.pdf> accessed 4 April 2018.

¹⁷² Fernando Araújo, ‘Opening Statement of the Portuguese Secretary of State Assistant and of Health’ (Speech delivered at the 60th Session of the Commission on Narcotic Drugs, Vienna, 13 March 2017) <http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_60/Statements/13_14March/Portugal.pdf>. accessed 4 April 2018

Right after the approval of the UNGASS 2016 Outcome Document, the Portuguese delegation, during the regular sessions of the CND, advocated for only considering the UNGASS 2016 Outcome Document as the only reference document to establish drug related strategies. There is no one single mention to the 3 international Drug Control Conventions or the 2009 Political Declaration.

¹⁷³ Fernando Araújo, ‘Opening Statement of the Portuguese Secretary of State Assistant and of Health’ (Statement delivered at the 59th Session of the Commission on Narcotic Drugs, Vienna, 14 March 2016)

been arguing that problems such as supply and demand will continue to exist and, therefore, drug strategies and policies should focus primarily on the human aspect of the problem, which refers to social and health related issues.

Notwithstanding all this, the Portuguese Government established in 1999 the National Strategy for The Fight Against Drugs (NSFAD), which has can be recognized as innovative, effective (taking into consideration the issues Portugal wanted to tackle), and framed within the scope of the Three International Drug Control Conventions, although the final goals of this strategy are not the ones the international community has been trying to tackle since the establishment of the regime.

The policies established by Portugal to tackle its drug problem are described in three strategic documents: the above mentioned NSFAD established in 1999; the National Plan Against Drugs and Drug Addiction 2005-12; and National Plan for the Reduction of Addictive Behaviours and Dependencies 2013-20¹⁷⁴.

It could not be clearly stated if the interest of Portugal at the time of elaborating its national strategy was to generate a change in the framework of the IDCR, but undoubtedly, as will be explained later, it caused an evolution of the regime within the framework of the existing documents. The Portuguese strategy was questioned by different actors, especially by the INCB. However, at the end, as it will be explained, the Board had to reinterpret the way in which it understood various aspects of the 3 international conventions, especially regarding the decriminalization of consumption, given that different States considered that the application of measures like the Portuguese could be beneficial. Also, even the States that decided to maintain restrictive measures in relation to consumption did not argue about a possible violation by Portugal of the three conventions. While

<https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements_14_March_PM/04_Portugal.pdf> accessed 5 April 2018

¹⁷⁴ European Monitoring Centre for Drugs and Drug Addiction, 'Portugal Country Drug Report 2017' (*European Monitoring Centre for Drugs and Drug Addiction*, 2013)

<<http://www.emcdda.europa.eu/system/files/publications/4508/TD0116918ENN.pdf>> accessed 5 April 2018

it is true that the conventions prohibit decriminalization of consumption, a reinterpretation of the respective articles was necessary to make the regime more flexible to allow these new strategies. To better understand this process, it is necessary to briefly analyse the emergence of Portuguese strategies and policies.

7.1 Brief evolution summary of the Portuguese Drug Control Regime

To understand the way in how Portugal came to establish in 1999 a different strategy from everything that had been tried before, it is important to consider the evolution of the drug control regime in that country. It could be said that Portugal always had a much more permissive system than other European partners. Although consumption has been criminalized for many years, the punishments were not considerable. As stated by Ricardo Gonçalves, during the first half of the twentieth century, in which prohibitionist regimes proliferated all around the world, the problem of drug consumption in Portugal was minimal and limited to a social elite not associated with organized crime¹⁷⁵. The Portuguese laws to control the issue of drugs were limited to their commercialization and to control the profits related to drug trafficking in the Portuguese colonies in Timor and Macau¹⁷⁶. So, even though in 1961 Portugal was one of the signatory States of the Single Convention, its ratification only came 10 years later.

However, the authoritarian regime of Marcelo das Neves Alves Caetano (1968-1974), who replaced the former dictator Antonio de Oliveira Salazar, sought to implant a social heterodoxy and traditionalism to relaunch the “Portuguese essence”¹⁷⁷, modified this relatively permissive regime. Apart from ratifying the Single Convention of 1961, the Portuguese regime joined the most radical countries such as the United States, China and Russia in defending the importance of fighting against the consumption of narcotics

¹⁷⁵ Ricardo Gonçalves, Ana Lourenço and Sofia Nogueira da Silva, ‘A social cost perspective in the wake of the Portuguese strategy for the fight against drugs’ (2015) 26(2) IJDP 200

¹⁷⁶ Ricardo Gonçalves, Ana Lourenço and Sofia Nogueira da Silva, ‘A social cost perspective in the wake of the Portuguese strategy for the fight against drugs’ (2015) 26(2) IJDP 200

¹⁷⁷ David Corkill, ‘Aspects of Portugal's economic development during the late Estado Novo’ (2003) 2(1) PJSS 61.

due to “moral reasons”¹⁷⁸. However, it should be noted that this change in the Portuguese view of the WDP may have been excessively alarmist and populist, given that there is no information proving that drug consumption in Portugal became a social problem at that time¹⁷⁹. In other words, and using some elements from the cognitive theories of regime changes, the variations came due to ideological variations of the leaders, but not due to a modification of the internal social situation.

Finally, at the beginning of the 1980s, the most important change occurred in Portugal in terms of the understanding of the drug problem. After an internal debate involving politicians, experts from different national instances and representatives of civil society, Portugal began to consider drug addiction as a disease, which implied the need for “*harm reduction*” and social control. This began to shape what would be its national drug strategy starting in 1999. So, even though Portugal did not decriminalize consumption, the penalties applied for it were, as stated by Ricardo Gonçalves, “symbolic”, which finally gave the opportunity for the crimes to be discarded. However, what persisted from the previous regime is that Portugal continued to persecute all the people involved in drug trafficking, for whom the penalties continued to be harsh¹⁸⁰.

After this change on mentality, in 1995 the Parliament of Portugal created a Committee for the Assessment of Drug Addiction, Consumption and Traffic, that started a debate regarding the future of drug control policies as well as the future of the cooperation on drug related issues. Considering the importance and social conscience that this debate generated in Portugal, the Government decided to establish a Committee of specialists and scientists with the task of presenting a strategy proposal for its approval by the Government. The report of this group, as well as the result of the public

¹⁷⁸ This stage of the evolution of IDRC has been explained in greater detail in the historical review of this investigation.

¹⁷⁹ Candido da Agra, ‘Requiem pour la guerre à la drogue: L’expérimentation portugaise de décriminalisation’ (2009) 33(1) *Déviance et Société* 27

¹⁸⁰ European Monitoring Centre for Drugs and Drug Addiction, ‘Portugal Country Drug Report 2017’ (*European Monitoring Centre for Drugs and Drug Addiction*, 2013)
<<http://www.emcdda.europa.eu/system/files/publications/4508/TD0116918ENN.pdf>> accessed 5 April 2018

debate which involved national organizations, the private sector and the civil society, gave birth to the NSFAD¹⁸¹.

The national strategy of Portugal, as expected, was mainly focused on addressing aspects related to drug use and addiction, given that this was Portugal's main problem related to narcotics abuse. However, Portugal abandoned the traditional measures related to criminal prosecution of consumption and micro-marketing, mainly to address social and public health aspects of the problem.

The six objectives established in the Portuguese National Strategy against Drugs are the following¹⁸²:

- I. To contribute to an appropriate and efficient international and European strategy for the World Drug Problem, as regards demand and supply reduction and which includes the fight against illicit trafficking and money laundering.*
- II. To provide Portuguese society with better information about the phenomenon of drugs and drug addiction, as well as the dangers of particular drugs, from a preventive perspective;*
- III. To reduce the use of drugs, especially among younger members of the population;*
- IV. To guarantee the necessary resources for treatment and social reintegration of drug addicts;*
- V. To protect public health and the security of people and property.*
- VI. To repress illicit traffic of drugs and money laundering.*

In these priorities, as can be seen, the traditional objectives of the international community such as the elimination of supply and demand are not met. As has been pointed out, Portugal's priorities show that there is a complete refocusing of the WDP to address it as a social and public health issue. However, this does not mean that Portugal has stopped fighting illicit trafficking.

¹⁸¹ Ricardo Gonçalves, Ana Lourenço and Sofia Nogueira da Silva, 'A social cost perspective in the wake of the Portuguese strategy for the fight against drugs' (2015) 26(2) IJDP 200, 200-209

¹⁸² Government of Portugal, 'National Drug Strategy' (Government of Portugal, 1999)
<http://www.emcdda.europa.eu/system/files/att_119431_EN_Portugal%20Drug%20strategy%201999.pdf> accessed 4 April 2018.

Portugal is the closest nation in Europe to the World's primary producer and exporter of cocaine (Colombia). In addition, there are historical links between Portugal and other Latin American countries that facilitate the development of drug trafficking networks. Trafficking in and through Portugal is therefore significant, not only for the Portuguese, but also for the European drug problem. Since the introduction of the new strategy, there have been considerable increases in the amount of drugs seized. There were increases of more than 100% in the amount of heroin, cocaine, cannabis and ecstasy seized between the four years 1995-1999 and the 2000-2004 period, even though the number of seizures decreased. This could indicate that the Portuguese authorities have successfully refocused their supply reduction efforts on large-scale operations, rather than street level deals involving small amounts of drugs¹⁸³.

It should be borne in mind that Portuguese policies did not focus solely on the public health aspect. From a social point of view, Portugal stopped pursuing micro-merchants, considering that many of them were also victims of the problem. Its focus on reducing supply focused on large traffickers.

7.2 International response to the Portuguese strategy

Even though nowadays institutions such as the INCB no longer point to Portugal indicating that their strategy is in violation of the 3 international conventions, when they began to be implemented it caused great international concern. INCB considered that the risks that Portugal was undertaking were extremely high and that it could cause a different effect from the one desired. In other words, the Board considered that these policies could lead to an increase in the abuse of narcotics. INCB even sent a Mission to Portugal trying to persuade the Government not to implement

¹⁸³ Caitlin Hughes and Alex Stevens, 'The effect of decriminalization of Drug Use in Portugal' (The Beckley Foundation 2007)
<https://kar.kent.ac.uk/13325/1/BFDPP_BP_14_EffectsOfDecriminalisation_EN.pdf.pdf>
accessed 7 April 2018

measures such as decriminalization of possession and consumption of drugs, considering this could send a wrong message to other countries.

INCB stated in its 1999 report that *“In April 1999, a draft law was approved in Portugal stipulating that drug users will face fines rather than jail sentences. Under the new law, the abuse and possession of drugs for personal use will no longer be criminal offences but only administrative offences.*

“As the Board has stated repeatedly, this is not in line with the international drug control treaties which require that drug use be limited to medical and scientific purposes and that States parties make drug possession a criminal offence. It should be noted that the exercise of criminal jurisdiction is discretionary and Governments may provide offenders with alternatives to conviction and punishment.”¹⁸⁴¹⁸⁵

As can be seen, the INCB clearly stated that, in accordance with the three drug control conventions, States are obliged to establish that the possession of drugs is a criminal offense. This, as indicated in the quoted INCB report, is based on what is established in article 3, paragraphs 1 and 2, of the 1988 Convention. Paragraph 1, in its numeral iii, indicates that the signatory States of the Convention should establish as a criminal offense the possession or purchase and sale of psychoactive substances. However, this should happen only when it is related to the provisions of numeral i, which refers to

“production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention”.

¹⁸⁴ International Narcotics Control Board, ‘INCB Report 1999’ (*International Narcotics Control Board*, 2000) 56

<https://www.incb.org/documents/Publications/AnnualReports/AR1999/AR_1999_E.pdf> accessed 10 April 2018

¹⁸⁵ INCB, as the “watchdog” of the Three International Drug Control Conventions, is allowed to make these kind of statement regarding the behavior of States, although they might be perceived by some States as to extreme.

The argument presented by INCB gets stronger considering paragraph 2 of article 3 of the 1988 convention. This article establishes that Parties to the convention

“subject to its constitutional principles and the basic concepts of its legal system, shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.”

The question that arose in this sense is if Portugal's new strategy was against this article.

Portugal for many years, especially after adhering to the conventions, typified consumption as a crime, although the penalties were extremely low¹⁸⁶. This responded to a particular way of understanding the problem of drug consumption at a particular point in time. Subsequently, the internal law of Portugal changed, and as has been pointed out, consumption became an administrative fault. The provisions of paragraph 2 of article 3 of the 1988 Convention are subject, as established in the same paragraph, to the constitutional principles and the basic concepts of the legal system of each State. In that sense, Portugal has repeatedly argued that drug use and addiction is considered as a disease, and as such, its constitution and legal system prevent it from being criminalized. This is a vision shared by many States, both those that defend traditional strategies and those that seek alterations in the IDCR¹⁸⁷.

¹⁸⁶ Ricardo Gonçalves, Ana Lourenço and Sofia Nogueira da Silva, 'A social cost perspective in the wake of the Portuguese strategy for the fight against drugs' (2015) 26(2) IJDP 200

¹⁸⁷ The interventions of the different States during the CND can be found on the Commission's website. (<http://www.unodc.org/unodc/en/commissions/CND/index.html>). Through these interventions it can be observed that most countries seek to point out that the use of drugs is a disease that must be treated and not penalized.

7.3 Impact of the Portuguese Policies in the IDCR

Bearing this in mind and considering the report of the INCB published the very next year, it can be concluded that the Board noted that they went too far by accusing Portugal of going against what it is allowed in the framework of the three conventions. In the year 2000 report, INCB stated only that “*The parliament of Portugal decided in July 2000 that penal sanctions would no longer apply to the illicit use, possession and acquisition for personal use of all drugs. Instead, those offences would be subject to administrative sanctions, such as fines, or other limitations of rights, such as the suspension of driving privileges.*¹⁸⁸” In that sense, the accusations that this regulation did not meet what was established in the conventions stopped. This change of position can also be explained by the Mission sent by INCB to Portugal on 2000. The Government of Portugal, after the report issued in 1999, was very interested in discussing the new strategy with the INCB, especially regarding the changes in the scope of sanctions for possession and acquisition of drugs for personal use.

What happened between Portugal and the INCB shows loopholes contained in the international narcotics control regime, especially when the regime's "watchdog" overrides its mandate and its work. As mentioned, it is the task of INCB to ensure that all States comply with the provisions of the Three International Drug Control Conventions. However, determining if a strategy is framed within the powers that States have to implement the conventions results in a grey line that must be defined, especially when, as in the case of Portugal, INCB reconsidered its position. This leads us to think more about a structural problem and lack of flexibility not of the Conventions but of the INCB itself. This institution has been so accustomed to promoting coercive strategies that, when observing an innovative model that had not been applied before by any member state and that aimed to focus more on

¹⁸⁸ International Narcotics Control Board, ‘INCB Report 2000’ (*International Narcotics Control Board*, 2001) 65
<https://www.incb.org/documents/Publications/AnnualReports/AR2000/AR_2000_Chapter_III_Europe.pdf> accessed 10 April 2018

social problems derived from illicit drug trafficking, its first conclusion was that this strategy had to be against the three conventions.

In this sense, and after the visit to Portugal through which the Government had the opportunity to present to the Board the scope of its new strategy, the INCB, in its report of the year 2000, pointed out that *“by adopting the new national drug strategy, the Government of Portugal has embarked on a wideranging review of drug-related legislation. The Board will continue to monitor the developments in that area. The Board expects that new legislation will be fully in line with the international drug control treaties”*¹⁸⁹.

One of the main impacts - beyond the fact that the INCB has ceased to indicate that countries that decriminalize the consumption and possession of small amounts of narcotics are outside the framework of the three conventions - is the fact that agencies of the system of the United Nations have begun to give recommendations promoting these policies. For example, WHO, in its Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations, makes a general call to rethink policies in relation to the criminalization of drug use, considering a public health perspective and the impact of restrictive policies on the transmission of diseases such as HIV using syringes¹⁹⁰.

In the case of the WHO, this recommendation can be understood considering that its mandate is related to health issues. However, the most enigmatic case is the Joint United Nations Statement on Ending Discrimination in Health Care Settings, which, although it continues to address fundamentally health aspects, was launched by all entities of the United Nations system and points the importance of considering policies that decriminalize drug consumption. The pertinent article of the statement reads like this:

¹⁸⁹ International Narcotics Control Board, 'INCB Report 2000' (*International Narcotics Control Board*, 2001) 65

<https://www.incb.org/documents/Publications/AnnualReports/AR2000/AR_2000_Chapter_III_Europe.pdf> accessed 10 April 2018

¹⁹⁰ World Health Organization, 'Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations' (*World Health Organization*, 2014)

<<http://www.who.int/hiv/pub/guidelines/keypopulations/en/>> accessed 15 April 2018

Reviewing and strengthening laws to prohibit discrimination in the provision and distribution of health care services, as well as in relation to education and employment in the health sector. Laws and policies must respect the principles of autonomy in health care decision-making; guarantee free and informed consent, privacy and confidentiality; prohibit mandatory HIV testing; prohibit screening procedures that are not of benefit to the individual or the public; and ban involuntary treatment and mandatory third-party authorization and notification requirements. All stakeholders should support the clear dissemination, implementation, and monitoring of adherence to such laws and regulations and their translation into policies and practice.

Reviewing and repealing punitive laws that have been proven to have negative health outcomes and that counter established public health evidence. These include laws that criminalize or otherwise prohibit gender expression, same sex conduct, adultery and other sexual behaviours between consenting adults; adult consensual sex work; drug use or possession of drugs for personal use; sexual and reproductive health care services, including information; and overly broad criminalization of HIV non-disclosure, exposure or transmission.

Reviewing, strengthening, implementing and monitoring health professional policies, regulations, standards, working conditions and ethics, for the prohibition of discrimination on all grounds in connection to health care settings¹⁹¹.

It is true that in all the text quoted of the Joint Statement there is only one specific mention to the drug issue, to the importance of considering the decriminalization of consumption and that all this is immersed in a broader framework that speaks of the importance of non-discrimination in health matters. However, and despite being brief, this mention implies a great turn in relation to the subject, and has been used by several States to continue with similar policies to the ones applied by Portugal. At the same time, it places the INCB in an extremely complicated position, given that the Board,

¹⁹¹World Health Organization, 'Joint United Nations statement on ending discrimination in health care settings' (27 June 2017) <<http://www.who.int/en/news-room/detail/27-06-2017-joint-United-nations-statement-on-ending-discrimination-in-health-care-settings>> accessed 20 April 2018

in case it maintains its opposition to decriminalizing policies, would be going against appeals made by other United Nations Organizations.

7.4 Portuguese actions through a theoretical view

As it has already been said, it cannot be definitively stated whether Portugal had an intention to achieve changes in the international regime or the Government was just thinking about strategies that could benefit their own population. Undoubtedly, the Portuguese Government argued that it needed to address a specific situation through new policies, which subsequently led to a partial redefinition of the regime, given that INCB had to accept the reinterpretation made by Portugal in relation to decriminalization of drug use. And this occurred mainly because Portugal got international support and similar measures to stop persecuting the drug user and to begin to apply to these users a prevention and public health approach were applied worldwide.

However, considering cognitive theories of regime changes, it should be noted that in Portugal and in the other countries that decided to decriminalize consumption occurred a change of ideology, values and beliefs in relation to the abuse of narcotics. As already noted, cognitive approaches are particularly important in explaining the substantive content of the rules and why they evolve. *Cognitive approaches are therefore particularly important in explaining the substantive content of regime rules and why they evolve. By elevating the importance of actor learning, cognitive theories have a dynamic other theoretical approaches lack*¹⁹². In this specific case, we are faced with a fact in which the norms of the regime were not modified, but the way of understanding them evolved. In that sense, Portugal tried to prove the INCB, and in a certain way the International Community, that it was necessary to understand the 3 international conventions in a more flexible manner, which was successful at the end.

¹⁹² Stephan Haggard and Beth Simmons, 'Theories of international regimes' (1987) 41(3) International Organization 491, 510.

On the other hand, through a functional approach, the regime, according to the understanding of Portugal, was clearly not being effective, so it needed to apply new policies that eventually ended up modifying it¹⁹³. Per the school of structuralist thinking, changes in the regime occur when it stops working for all or some of its members. In that sense, it has been observed that several States understood that a specific aspect of the regime did not seem to be working, so they looked for ways to escape from the scope of the articles of the three conventions that forced States to penalize consumption. These articles, nevertheless, are still part of the conventions. So, at least in instrumental terms, the regime remains invariable. However, the fact that the INCB no longer points out and blames the States that have decriminalized consumption shows that the regime has changed, even though a large part of the international community continues to apply policies that punish consumers.

Regarding a strategic and game-theoretic approach, it doesn't result entirely useful for analysing the evolution of the regime as a result of the new policies promoted by Portugal. As indicated in the theoretical framework, this approach seeks to analyse the interaction and cooperation between the different States, which shapes the regime¹⁹⁴. That is, it is more efficient to understand the emergence or rupture of the regime, but not so much to understand why it is that the regimes change. The Portuguese strategy has an important focus on international cooperation. However, the policies that were considered "revolutionary" or outside the legal framework of the regime such as the decriminalization of consumption did not imply interaction with other States. While the INCB maintained a follow-up to these policies and the elaboration of the strategy, Portugal finally focused on its internal situation and how it would approach, almost alone, the problem of consumption within its borders.

¹⁹³ Andreas Hasenclever, Peter Mayer and Volker Rittberge, 'Integrating Theories of International Regimes' (2000) 26(1) RIS 3

¹⁹⁴ Andrew Kydd, *International relations theory: the game-theoretic approach*. (Cambridge University Press 2015)

Finally, the structuralist school focuses primarily on the situation and international conditions to understand change within the regimes. In the case presented in this chapter, it should be noted that Portugal did not act based on a new specific situation at the international level. Said State, as indicated above, responded to an internal situation and to a different way of wanting to address the problem of drug use. However, structuralism does help to understand the impact of these national policies undertaken by Portugal that led to the evolution of the IDCR. Portugal, intentionally or not, fostered an international situation that caused several States to start implementing similar policies. In view of this, the INCB had to give in and accept that these policies could be reinterpreted to fit into the IDCR. Otherwise, the INCB would have had to continue defending a position within the regime that was unsustainable, given that despite all the warnings given, these decriminalization policies caused a positive impact among various members of the international community.

The previous paragraphs could lead to the conclusion that the regime is as flexible as what the States that are part of it, allow it to be. Effectively, the INCB is the institution in charge of ensuring that States comply with the most strictly opposable provisions of the 3 international conventions. However, when the disobedience is generalized, the Board must re-evaluate its position in order not to lose legitimacy as the "guardian" of the regime. Portugal's disobedience became an accepted strategy given that it proved to be successful and attractive to a significant number of Member States. At the same time, these policies ceased to be questioned not only by the INCB, but also by States that maintain punitive policies against consumers, thus recognizing that the Conventions are flexible even in those cases where before it seemed that they were not. However, this flexibility has a limit, and it is within those limits that States can implement new strategies. These limits are demonstrated, for example, with regard to the legalization of cannabis for recreational uses, which will be detailed in the next chapter.

8. Uruguay, Canada and United States: new strategies breaking the International Drug Control Regime

The legalization of non-medical use of cannabis contravenes the international drug control treaties. Universal and full implementation of the treaties is put at serious risk because States parties, such as Canada and Uruguay (as well as states in the United States), have legalized cannabis for non-medical use. The actions of those countries and state jurisdictions undermine the treaties. They may also encourage other States parties to follow their example and use it as a justification for doing so¹⁹⁵.

In the previous chapters, two emblematic cases have been analysed in which the Three International Drug Control Conventions were sufficiently broad and flexible to accommodate emerging needs of the States. Although in the case of Bolivia a significant number of States, especially world powers, protested against the action taken by this south American Government, and that in the case of Portugal the INCB repeatedly pointed out that the Portuguese State's policies contravened the conventions, finally both countries managed to assert their position without being internationally blamed for contravening their international commitments. In the Portuguese case, as we observed, this was clearly due to the strength and momentum that the Government put in to show that the three conventions were being respected. Because of this, several countries passed policies to decriminalize the possession and consumption of controlled substances for recreational purposes.

The cases that will be presented in this chapter are related not only to the decriminalization but also to the legalization of consumption of cannabis for recreational purposes, which is expressly prohibited by the Single Convention of 1961, not leaving any space for reinterpretations as it

¹⁹⁵ International Narcotics Control Board, 'INCB Report 2018' (*International Narcotics Control Board*, 2019) 11 < <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2018.html> > accessed 10 February 2019

happened in the case of Portugal with the decriminalization of consumption. The Single Convention of 1961 states, in its article 49, the following:

A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories the use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes.

Nevertheless, the same article establishes that

“the reservations under paragraph 1 shall be subject to the following restrictions: The use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41”¹⁹⁶.

It is also worth mentioning that the Single Convention, in its articles 23 and 28, mandates States to create specialized agencies to control the legal cultivation, which is limited to very specific purposes. Although article 23 only mentions the cultivation of Poppy, article 28 establishes that *“if a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy”¹⁹⁷*. So, by reading these articles it becomes clear that one of the main objectives of the Single Convention is to eliminate the use of cannabis for non-medical purposes.

Another relevant issue to highlight about the international control of Cannabis is that the CND agreed to put this substance into the Schedules I and IV of the 1961 Single Convention, which means that, per the international regime, cannabis is particularly liable to be abused and to produce harmful effects, and such liability is not offset by substantial therapeutic advantages. It is debatable whether in fact not enough medical uses of cannabis are known to make a reclassification of this substance, especially considering that in recent years several countries have begun

¹⁹⁶ Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol (adopted 25 March 1961) Article 49

¹⁹⁷ Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol (adopted 25 March 1961) Article 28

processes of adaptation of their domestic legislation with cooperation from the INCB to allow the medicinal use of cannabis. Medical use is allowed by the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, provided several conditions are met¹⁹⁸. So, nowadays the presence of cannabis in Schedule IV is what could generate more controversy, considering that it contains the list of substances that should be controlled the most.

The debate regarding the reclassification of cannabis has taken place both internationally and nationally. The case of the United States may be one of the most emblematic, considering that this country has long led the War on Drugs. Since 2016, the Drug Enforcement Administration (DEA) has been considering the possibility of rethinking its position in relation to the classification of cannabis¹⁹⁹. Although not much has changed in recent years, this agency has been promoting further research on this substance. And this is a fundamental issue in relation to the reclassification of cannabis. Since different representatives of the medical community have indicated that a reclassification should take place²⁰⁰, many studies are being conducted regarding its possible side effects. The WHO, the leading international medical authority, is currently in the process of reviewing the therapeutic usefulness of cannabis as well as its abuse and dependence liability, public health and social harm potential, and has recommended to the CND a reclassification of cannabis and some of its derivatives. The full result of its review will become known in due course²⁰¹. Nevertheless, and following the spirit of the Single Convention of 1961, it is also clear that

¹⁹⁸ International Narcotics Control Board, 'The Therapeutic use of Cannabis' (*International Narcotics Control Board*, 2017) <https://www.incb.org/documents/News/Alerts/Alert_on_Control_of_Narcotic_Drugs_June_2017.pdf> accessed 19 November 2018

¹⁹⁹ Andrew Denney, 'Judge: DEA, Not Courts, May Be Better Forum to Challenge Cannabis Policy' (2018) 259(31) NYLJ 1

²⁰⁰ Paul Armentano, 'American Academy of Pediatrics Calls For Rescheduling Cannabis' (*NORM* January 26 2015) <https://blog.norml.org/2015/01/26/american-academy-of-pediatrics-calls-for-rescheduling-cannabis/> Accessed 10 January 2019.

²⁰¹ International Narcotics Control Board, 'The Therapeutic use of Cannabis' (*International Narcotics Control Board*, 2017) <https://www.incb.org/documents/News/Alerts/Alert_on_Control_of_Narcotic_Drugs_June_2017.pdf> accessed 19 November 2018

despite any discussion about the reclassification of cannabis, it should remain as a controlled substance and forbidden for recreative purposes.

In the case of the United States, cannabis is classified in schedule I of controlled substances. It should be noted that this country has its own classification of substances, which differs in various aspects of the classification created by the three conventions. Schedule I of the United States is a kind of fusion between the schedules I and IV of the Single Convention of 1961, since it covers highly addictive substances without relevant known medical use.

However, and despite the internal and national debates that exist regarding the need or not to reclassify cannabis in the lists of substances controlled by the 1961 Convention, at present cannabis continues under a strict regime of international control, therefore, its use for purposes other than medical or scientific purposes is strictly prohibited. Also, there are differentiated positions in relation to the motivations for which some countries would consider allowing recreational use of cannabis. Motives have been raised related to security, fight against the black market, public health, human rights, among others. However, there is no evidence so far, beyond theoretical approaches, that give justifications to States to violate the three conventions to test innovative strategies of this type.

8.1 United States of America: Compliance or non-compliance?

President of the International Narcotics Control Board (INCB), Raymond Yans, has voiced grave concern about the outcome of recent referenda in the United States of America that would allow the non-medical use of cannabis by adults in the states of Colorado and Washington, and in some cities in the states of Michigan and Vermont. Mr. Yans stated that “these developments are in violation of the international drug control treaties and pose a great threat to public health and the well-being of society far beyond those states”.

Noting that studies have shown that the abuse of cannabis can cause cognitive problems as well as contribute to mental

disorders, the INCB President said: “Legalization of cannabis within these states would send wrong and confusing signals to youth and society in general, giving the false impression that drug abuse might be considered normal and even, most disturbingly, safe. Such a development could result in the expansion of drug abuse, especially among young people, and we must remember that all young people have a right to be protected from drug abuse and drug dependency.”

The limiting of the use of cannabis to medical and scientific purposes is laid out in the 1961 Single Convention on Narcotic Drugs, which was agreed to by 185 States, who by consensus decided to place cannabis under control and limit its use to medical purposes. “Since the adoption of this Convention, very potent new forms of cannabis have appeared on the illicit market, and technological advances have been used to increase the content of the most ‘active ingredient’, so to speak, in cannabis, tetrahydrocannabinol (THC). The cannabis on the illicit market today is much more dangerous than that seen in the 60s and 70s,” stressed the President of INCB (...). In this regard, Mr. Yans stressed that national laws, policies and practices in drug abuse prevention and control should be fully aligned with the conventions. He further emphasized that States Parties have an obligation under the Conventions to ensure their full compliance with the conventions within their entire territory, including federated states and/or provinces.

Mr. Yans recognized the commitment of the Government of the United States to resolve the contradiction between the federal and state levels in the implementation of that country’s obligations under the drug control conventions. The INCB President requested the Government of the United States to take the necessary measures to ensure full compliance with the international drug control treaties within the entire territory of the United States, in order to protect the health and well-being of its citizens²⁰².

This was the position adopted by the INCB in 2012 after the decision taken by several states of the United States to legalize cannabis for recreational

²⁰² International Narcotic Control Board, ‘INCB President voices concern about the outcome of recent referenda about non-medical use of cannabis in the United States in a number of states’ <https://www.incb.org/documents/Publications/PressRelease/PR2012/press_release_151112.pdf> accessed 17 December 2018

purposes. The case of the United States is particularly difficult to analyse, considering that the internal situation of many states is not consistent with the federal position at the international level²⁰³. Recreational consumption of marijuana for recreational purposes is legal in California, Alaska, Colorado, Maine, Massachusetts, Nevada, Michigan and Oregon, Washington State and Vermont. Additionally, other states such as New York are considering the adoption of similar measures. Likewise, more than 30 States have already approved the use of marijuana for medical purposes which, although not prohibited by the international drug control conventions, is not universal within the country.

However, at the federal level, cannabis use for recreational purposes is still prohibited²⁰⁴, which automatically makes the legalization of cannabis illegal also in the states that have legalized it. Even though the Federal Government has taken a lax attitude towards these states, leaving them to legislate on the matter without major intervention, the federal law enforcers could continue acting against any person or business related to the purchase and sale of cannabis for recreational purposes. This puts the United States in a position of theoretical international compliance with the three International Drug Control Conventions, given that, regardless of what happens in the individual states mentioned, in the country as a whole the use of cannabis for purposes other than medical and scientific remains prohibited.

Notwithstanding the declaration of the INCB made in 2012 that condemned the approval in several States of the recreational use of marijuana, it is noteworthy that the Board, in subsequent reports, avoids mentioning the subject in a large measure. In 2012, the Board noted that it had received a commitment from the Federal Government to resolve the contradiction between the federal and state levels of the country's implementation under the drug control conventions. However, since that year the number of states

²⁰³ Candice Bowling and Stanton Glantz, 'Conflict of Interest Provisions in State Laws Governing Medical and Adult Use Cannabis' (2019) 109 (3) AJPH 423

²⁰⁴ Rebecca Sweeney, 'Unrealistic expectations: the federal government's unachievable mandate for state cannabis regulation' (2018) 94(4), WLR 2175

that have approved these measures has grown instead of decrease. INCB, in its annual report for 2017, only mentions that *the Board continued to monitor the developments in the United States regarding the control of cannabis, including the initiatives taken at the level of the country's constituent states to legalize cannabis for non-medical purposes through ballot initiatives*". It also states that *"the United States saw increased domestic cultivation of cannabis leading to an overall increase in its availability"*²⁰⁵.

In view of this, the IDCR shows a clear flaw, given that, as mentioned, at the international level, the United States advocates for respect of the Three International Drug Control Conventions²⁰⁶ and at the federal level complies with the provisions contained therein, although nationally the situation is clearly evolving in a different way.

8.1.2 Motivations for Cannabis legalization

It is important to understand, in the case of the United States, the reasons why some States pursued the legalization of cannabis for recreational purposes. Motives like those of Uruguay and Canada related to public health and human rights have been argued. However, it can also be noted that the actions of the different states respond to the fact that, according to surveys conducted, 62% of the American population agrees with the legalization of cannabis, highlighting that 72% of young populations share their support for this initiative²⁰⁷. The implementation of popular measures

²⁰⁵ International Narcotic Control Board, 'IINCB Report 2017. (*International Narcotic Control Board*, 2018) Articles 187 and 488. <<https://www.incb.org/incb/en/publications/annual-reports/annual-report-2017.html>> accessed 22 November 2018

²⁰⁶ Michael Botticelli, 'Remarks to the Plenary Session of the 59th UN Commission on Narcotic Drugs' (Speech Delivered in the 59th Session of the UN Commission on Narcotic Drugs, Vienna, 14th March 2016) <http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements/15_United_States.pdf> accessed 11 March 2017> accessed 20 November 2018

²⁰⁷ Hannah Hartig and Abigail Geiger, 'About six-in-ten Americans support marijuana legalization' (*Facttank*, 8 October 2018) <<http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>> accessed 1 December 2018.

is directly related to the popularity of politicians and benefits them in future elections.

To the evident popular support that exists within the United States in relation to the legalization of cannabis for recreational and medical purposes, we must add the importance in financial terms that this measure represents. Per CNN²⁰⁸, and citing Tom Adams, director of BDS Analytics²⁰⁹, the legal cannabis industry obtained 9 billion dollars in sales in 2017, and that figure was expected to increase to 11,000 million in 2018 and 21,000 million by 2021. Also, approximately 120,000 people work in the legal marijuana industry, and it is expected that by 2021 that number will reach 290,000 people²¹⁰. It is not surprising that there are both public and private interests interested in controlling the legal cannabis market in expansion, which are those that could use lobbies to obtain favourable legislation in this matter.

Control of the market in terms of public health is also one of the reasons argued by many States legalizing cannabis. Each State decides what is most convenient and which limits it wants to impose on the cannabis industry. In general terms, states regulate from the seed of the crops to the sale of the dose. They do tests on the plants, examine the laboratories, establish regulations on substances, hygiene, places where cannabis is sold, etc. Each dose is labelled with the product information, which is also an advantage for consumers because people know what they are consuming, while in states where it is not regulated they have no idea what they will get. The argument is that consumers in states where marijuana is legalized can make less risky decisions and decide better.

Another key aspect raised by the defenders of the legalization of cannabis in the United States is related to the crisis of opioids abuse and the

²⁰⁸ Aaron Smith, 'The U.S. legal marijuana industry is booming' (CNN, 31 January 2018) <<https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/index.html>> accessed 22 February 2018

²⁰⁹ BDS Analytics produces the leading cannabis industry market trends reports, analyses and cannabis consumer research. <<https://bdsanalytics.com/>>

²¹⁰ Aaron Smith, 'La Industria de la Marihuana Legal en los Estados Unidos está en auge' (CNN, 1 February 2018) <<https://cnnespanol.cnn.com/2018/02/01/marihuana-legal-estados-unidos-industria-auge/>> accessed 2 March 2018.

appearance and proliferation of new psychoactive substances²¹¹. In that sense, Hannah Hetzer, policy manager of the International Drug Policy Alliance, argues the following:

“Something very interesting is that we have begun to see that in the states where medical and recreational marijuana was legalized, there was a reduction of overdose due to opioid (pain medication) consumption of 25 percent and 23 percent fewer hospitalizations for this reason. Marijuana could be used as a substitute for chronic pain and the consumption of other drugs, although it is a hypothesis we continue to study”²¹².

Considering this, and although there is not enough data yet to support this hypothesis, there are many who argue that cannabis could be a much less harmful substance that could work as a replacement for the abuse of substances that are creating a considerable social problem in the United States.

8.1.3 General considerations

As has been explained, the legalization of cannabis for recreational purposes in some territories of the United States does not respond to a federal State policy. In that sense, we cannot speak, for the moment, of an interest of the Government to affect the IDCR through internal measures that go against the commitments of the country at the international level. Each of the states that has taken measures aimed at legalization have done so for independent reasons such as the popularity of the measure, aspects of public health, economic motivations considering the profitability of the business, the control of the market to avoid the crimes related to the illegal traffic of cannabis, among others.

The INCB, for its part, has criticized the measures adopted by certain States of the country, requesting the Federal Government to work to eliminate the

²¹¹ Francisco Pascual and Calixto Sánchez, ‘Uso y mal uso de los fármacos opioides para el tratamiento del dolor’ (2019) 19 (1) HaA 31

²¹² Semana, Interview with Hannah Hetzer (Semana, 18 April 2018)
<<https://www.semana.com/nacion/articulo/beneficios-de-la-legalizacion-de-la-marihuana-en-estados-unidos/564069>> accessed: 23 May 2018

contradictions existing at national and international level. However, it has not stated openly that the Federal Government is not fulfilling its commitments related to the three conventions. Notwithstanding the present situation that is occurring with the INCB, it is to be noted that international law does not allow a country to justify itself in the laws of one or several of its states to breach an international commitment, as demonstrated, for example, in the case of the LaGrand brothers, which confronted Germany and the United States²¹³.

This situation could lead one to think that, without having sought it, the United States has managed to adapt to a changing reality within its country, which is the legalization of cannabis for recreational purposes, continuing within the normative framework of the three conventions.

However, this is an untenable situation over time, given that the more states continue with cannabis legalization policies, the harder it will be for the Federal Government to continue with this dichotomy in its speech. At the same time, should the number of states that have legalized the recreational use of cannabis grow, they could promote a change within federal policy, which would put the country in contempt of the 1961 Convention.

8.2 Canada and its decision of non-compliance

On the occasion of the entry into force of Bill C-45 which legalizes cannabis for non-medical purposes in Canada, the International Narcotics Control Board (INCB) reiterates its regret at the adoption of this measure by the Government of Canada.

²¹³ Yoshiyuki Lee-Iwamoto, 'The Repercussions of the LaGrand Judgment: Recent ICJ Jurisprudence of Provisional Measures' (2012) 55 JYIL 237

The LaGrand case concerns two brothers of German nationality who were sentenced to death in the United States for murder. Germany argued that the US Government, through the Arizona authorities, failed to comply with the Vienna Convention on Consular Relations by not allowing consular assistance to the LaGrand brothers. The International Court of Justice pointed out that it was the obligation of the United States to have transmitted the country's international obligations to all its administrative organs, including the Federal Government of Arizona, which indicated that it did not know this regulation. Although the Court noted that the sentence should be temporarily suspended, Arizona executed the LaGrand brothers.

The legalization by Canada of cannabis for non-medical purposes is incompatible with the legal obligations incumbent on States Parties under the international drug control framework and is a violation of fundamental provisions of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, according to which State Parties have undertaken to limit the production, manufacture, export, import, distribution of, trade in, use and possession of drugs exclusively to medical and scientific purposes.

Despite its statements to the contrary, INCB maintains that by moving forward with the legalization of cannabis for non-medical purposes in disregard of its legal obligations and diplomatic commitments, the Government of Canada has contributed to weakening the international legal drug control framework and undermining the rules-based international order.

Speaking on behalf of the Board, President Viroj Sumyai said: "While the Board is concerned about the impact of cannabis legalization in Canada on the international consensus embodied in the three United Nations drug control conventions and the related commitments made by the international community at the special session of the General Assembly in 2016, it is also deeply concerned about the public health impact of these policy choices on the health and welfare of Canadians, particularly youth."

The Board will remain engaged with the Government of Canada on this serious issue and will examine the matter at its 123rd session scheduled to take place from 30 October to 16 November 2018²¹⁴.

The message given by the INCB regarding the legalization of cannabis for recreational purposes is extremely strong. Canada, despite all the notices given by the Board, decided to go against its international commitments assumed in the framework of the three conventions. Regardless of the motivations put forward by Canada, which will soon be analysed, it is

²¹⁴ International Narcotic Control Board, 'Statement by the International Narcotics Control Board on the entry into force of Bill C-45 legalising cannabis for non-medical purposes in Canada'. (17 October 2018) <<https://www.incb.org/incb/en/news/press-releases/2018/statement-by-the-international-narcotics-control-board-on-the-entry-into-force-of-bill-c-45-legalising-cannabis-for-non-medical-purposes-in-canada.html>> accessed 21 October 2018

evident that, from a functional theory point of view, the restrictive regime against cannabis use is considered not to be efficient any more for Canada, which has led to internal changes that are having an enormous international repercussion.

It is not an objective of this research to analyse the possible effectiveness or not of the policies undertaken by Canada in relation to the approach of the WDP. The time elapsed is very limited to be able to reach a conclusion about it. What it is sought to be determined is whether Canada could not have taken advantage of the flexibility of the three conventions before approving measures that flagrantly violated said instruments.

The Canadian Cannabis Act²¹⁵ seeks to control the production, distribution, sale and possession of cannabis in the country. Per the law that was approved, the Act seeks to keep cannabis out of the hands of youth; keep profits out of the pockets of criminals; protect public health and safety by allowing adults access to legal cannabis.

According to the law,

subject to provincial or territorial restrictions, adults who are 18 years of age or older are legally able to:

- *possess up to 30 grams of legal cannabis, dried or equivalent in non-dried form in public*
- *share up to 30 grams of legal cannabis with other adults*
- *buy dried or fresh cannabis and cannabis oil from a provincially-licensed retailer*
- *in provinces and territories without a regulated retail framework, individuals are able to purchase cannabis online from federally-licensed producers*
- *grow, from licensed seed or seedlings, up to 4 cannabis plants per residence for personal use*
- *make cannabis products, such as food and drinks, at home as long as organic solvents are not used to create concentrated products*²¹⁶

²¹⁵ Government of Canada, 'Canadian Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts' <(2018) <https://laws-lois.justice.gc.ca/eng/acts/C-24.5/page-1.html>> accessed 22 October 2018

²¹⁶ Department of Justice of Canada, 'Cannabis Legalization and Regulation' (2018) <<https://www.justice.gc.ca/eng/cj-ip/cannabis/>> accessed 22 December 2018

The issue of public health and human rights has had great relevance in relation to the decision of Canada to legalize cannabis for recreational use, violating in this way their commitments in relation to the three conventions. The theory behind this situation is that the control of the market by the Government will make sure that these narcotics are used responsibly.

Supporters of legalization believe that a regulated market will offer a greater level of protection to vulnerable groups than the currently unregulated markets of today. One of the key benefits of legalization, believes is that it allows appropriate controls to be put in place over the price, availability (location, times of opening and age restrictions) It is precisely because drugs pose risks that they need to be appropriately regulated, especially for non-adults²¹⁷.

However, it is arguable to say that these acts alone will really suffice for public health not to be affected and for young people to have no access to cannabis. In countries where cannabis continues to be illegal, young people and children have access to this drug. Even in Canada, when restrictions were still enforced, vulnerable populations could buy cannabis on the black market. Legalization does not necessarily imply the disappearance of the black market. *On the flip side, it is currently illegal to sell alcohol and tobacco to under 18s and under 16s respectively. Few would disagree though that today it is relatively easy for under-age children to purchase or gain access to these products at present from places like controlled licensed off sales²¹⁸.*

As indicated above, this thesis does not seek to establish the possible effectiveness of the legalization of cannabis for recreational use. However, it is necessary to determine if the three conventions contain the necessary elements that allow to fight against the very threats that Canada is seeking to combat through the legalization of cannabis. As far as the fight against organized crime is concerned, simply turning the legal business into illegal does not mean that organized criminal groups will leave the business. There are even independent investigations that claim that several of the

²¹⁷ Alan Steel, 'Regaining control: a critique of drug legalisation policies' (2006) 6(1) DAT 19, 21

²¹⁸ Alan Steel, 'Regaining control: a critique of drug legalisation policies' (2006) 6(1) DAT 19, 21

main investors in the legal cannabis business are related to mafias and the black market.

Canadian Prime Minister Justin Trudeau's primary objective when he moved to legalize recreational marijuana nationwide was to bring down the criminal organizations linked to black market pot commerce. But a recent report from the Canadian Broadcasting Corporation (CBC News) shows that some of the largest cannabis producers in the northern nation have mafia ties and connections to drug trafficking operations. It's the first sign of how legalization could struggle to castrate the criminal underworld because there are still too many vulnerabilities allowing it to seep in through the cracks.

(...) There is no denying that Canada still has a flourishing black market for cannabis, and it probably will for a while. For now, the majority of the problem stems from the shortage of legal weed the country has endured since day one. But Stephen Schneider, a criminologist at Saint Mary's University, said last week that even after the shortage is remedied the black market will continue to thrive due to price and privacy concerns²¹⁹.

One of the main argued reasons for the legalization of cannabis, as we have seen, is that the black market would disappear. However, if there is a ban on consumption in certain sectors of society, the black market will continue. In that sense, children under 18 years will continue to demand cannabis, which can now be acquired not only through the black market controlled by the mafias but also by those who meet the requirements to access the legal market. Would it be wrong to think that an 18-year-old would deny sharing his cannabis with friends of 17 or 16 years? The answer is quite logical.

On the other hand, a liberalization of consumption through legalization policies could also increase situations of violence. Alan Steel points out that, despite what has been pointed out by the defenders of legalization, many acts of violence, including murders, occur under the influence of drugs²²⁰. Similarly, an increase in the consumption of cannabis derived from the legalization of commercialization could also lead to public safety hazards if,

²¹⁹ Mike Adams, 'Does Canada's Cannabis Industry Have Mafia Ties?' (*Forbes*, 5 November 2018). <<https://www.forbes.com/sites/mikeadams/2018/11/05/does-canadas-cannabis-industry-have-mafia-ties/#30ca99d37c66>> accessed 11 March 2019

²²⁰ Alan Steel, 'Regaining control: a critique of drug legalisation policies' (2006) 6(1), DAT 19

for example, people drive vehicles under the influence of marijuana or other drugs, as is already happening today with alcohol. It could be clearly argued that the legalization or control of the cannabis market would not necessarily increase consumption or the fact that people act negatively under its influence, but no data has been presented that would lead one to believe that legalization would prevent this from happening.

Naturally, the legalization of cannabis in Canada is accompanied by an implementation plan through laws and regulations, all of which are easily accessible to the public²²¹. And this implementation plan is accompanied by educational campaigns for prevention and awareness so that people, especially young people, understand the risks they incur when they consume cannabis. However, such campaigns do not really mean an innovation in relation to old Canadian policies related to cannabis use. Prevention and awareness have been present for decades. Similarly, there are similar campaigns related to the consumption of tobacco and alcohol, legal drugs, as well as drugs that continue to be illegal, such as new psychoactive substances, whose use has been growing exponentially in North America.

These educational campaigns, which are presented as an integral part of the Canadian implementation plan for legalization of cannabis, are fully aligned with the regulatory framework of the three conventions, so, if considered "innovative", it would be within the normative framework of the IDCR.

It has been argued many times that cannabis is less harmful than many drugs that were legal, such as alcohol and tobacco. Following that point of view, there shouldn't be any real reason why this drug should be illegal. Whether said affirmation is true or not, the States of the United Nations system agreed that cannabis would be used only for medical or scientific purposes. States cannot be selective when deciding which international

²²¹ Government of Canada, 'Cannabis laws and regulations' <<https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations.html>> accessed 22 November 2018.

obligations to respect and which not. If Canada considered legalizing cannabis either for reasons of struggle against organized crime, public health, or simply due to financial considerations and to attract the vote of young populations, they could have acted in the same way as Bolivia, first trying to perform an amendment to the 1961 Convention or simply withdrawing from the convention and entering again with a reservation. As has been seen in detail in this thesis, Bolivia had already set a precedent in this regard, and Canada could have acted in a similar way so as not to be singled out and blamed openly not only by the INCB but by other members of the international community.

8.3 Uruguay as a pioneer in cannabis legalization

In December 2013, the Senate of Uruguay approved new legislation, previously approved by the lower legislative chamber, that allows the State to assume control over and regulate activities related to the importation, production, storage, sale or distribution of cannabis or its derivatives, or the acquisition of any title related thereto, under certain terms and conditions, for the purpose of nonmedical use. The regulations governing the implementation of this law were fleshed out in a presidential decree in May 2014. Sales of cannabis to consumers were delayed, however, owing to difficulties in implementing the law.

Such sales are expected to start in 2015. The Board notes that this legislation is contrary to the provisions of the international drug control conventions, specifically article 4, paragraph (c), and article 36 of the 1961 Convention as amended by the 1972 Protocol and article 3, paragraph (1) (a), of the 1988 Convention.²²²

In December 2013, Uruguay enacted a law to establish a legally regulated cannabis market. Although similar markets for cannabis had already been

²²²International Narcotics Control Board, 'INCB Report 2014' (*International Narcotics Control Board*, 2015) 56 < <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2014.html> > accessed 10 April 2018

established in several US states, no other country had legalized cannabis for both medical and non-medical use at the national level²²³. Officially, the government's plans were mainly motivated by concerns about crime, insecurity and public protection - with the logic that a legal cannabis market would overcome most of the activity currently carried out by organized crime groups and, consequently, the rates of violence would be reduced²²⁴. It is noteworthy that Uruguay's cannabis law follows the line of the countries historical approach to drug policy. Even during the dictatorship of 1973-1985, the country was far from the highly punitive approaches of the "War on Drugs" that were being implemented in several other countries²²⁵. Although the dictatorship maintained strict condemnations for drug trafficking, in 1974 it decriminalized the possession of a minimum quantity of illicit substances, destined exclusively for personal consumption²²⁶. It was never exactly clarified what constituted that minimum quantity, which gave wide discretion to the judges in their interpretation. Throughout the years, the fact that Uruguayans could possess cannabis under the law, but could not legally acquire it, was constantly highlighted by civil society groups that put pressure in favour of legal forms of access to drugs.

Bearing this in mind, the legislators of Frente Amplio (FA), the ruling party in Uruguay, decided at the beginning of the decade of 2010 to consider a bill that would legalize domestic cultivation of up to eight plants and possession of up to 25 grams of cannabis. Given this initiative, former president José Mujica took control of the situation and in June 2012 his government published a 15-point document entitled "Strategy for life and coexistence," which proposed the regulated and controlled legalization of

²²³ WOLA, 'Ley de cannabis uruguaya: pionera de un nuevo paradigma' (WOLA, 2018) <https://www.brookings.edu/wp-content/uploads/2018/03/GS_06142018_Cannabis-Uruguay_Spanish.pdf> accessed 15 December 2018.

²²⁴ Roque Planas, 'Legalizing weed is 'a security issue', says Uruguayan president' (*The Huffington Post*, New York, 21 August 2014) 21 de agosto de 2014. http://www.huffingtonpost.com/2014/08/21/mujica-weed-security-_n_5698413.html accessed 12 January 2019

²²⁵ Guillermo Garat, *El camino: Como se reguló el Cannabis en Uruguay según sus actores políticos y sociales*. (Junta Nacional de Drogas and Friedrich Ebert Foundation 2015)

²²⁶ WOLA, 'Ley de cannabis uruguaya: pionera de un nuevo paradigma' (WOLA, 2018) https://www.brookings.edu/wp-content/uploads/2018/03/GS_06142018_Cannabis-Uruguay_Spanish.pdf accessed December 2018.

cannabis. Unlike the bill of Parliament to authorize the domestic cultivation of cannabis, President Mujica's proposal was to create a State monopoly on the production and distribution of cannabis²²⁷.

Finally, Mujica's proposal and the measure that was already under discussion within the Uruguayan parliament were presented in a second bill before the Congress that allowed domestic cultivation, as well as the commercial sale and the "cannabis clubs" that allowed the consumers to grow in groups with State authorization. The bill was approved in the House of Representatives in July 2013, approved by the Senate in December and enacted into law on December 20, 2013.

Per the National Drugs Board of Uruguay, the country applies its right to deploy an innovative experience while others defend the relevance of continuing to insist with repeatedly failed policies. The Board also points out that it is a political and cultural experience whose real impact on the life of Uruguayan society can be measured and appreciated in the medium term. Although it is an experience that is already being evaluated, the measurement and assessment of its impact requires a time not less than 4 or 5 years²²⁸.

Specifically, the cannabis law in Uruguay contains the following goals:

- 1. Reduce violence linked to drugs through the elimination of black market cannabis.*
- 2. Promote public health through education and prevention campaigns.*

²²⁷ WOLA, 'Ley de cannabis uruguaya: pionera de un nuevo paradigma' (WOLA, 2018) <https://www.brookings.edu/wp-content/uploads/2018/03/GS_06142018_Cannabis-Uruguay_Spanish.pdf> accessed 15 December 2018.

²²⁸ Guillermo Garat, *El camino: Como se reguló el Cannabis en Uruguay según sus actores políticos y sociales*. (Junta Nacional de Drogas and Friedrich Ebert Foundation 2015)

3 Eliminate the legal paradox that allowed possession but blocked access to cannabis for consumers.^{229 230}

However, the INCB has a different position around the idea of public health that Uruguay seeks to defend. The Board, following the approval of the cannabis regulation law in that country, noted that

*"The Board is very concerned that the draft legislation currently being considered in Uruguay would, if adopted, legalize production, sale and cannabis for The President of INCB, Raymond Yans, stated that "this would be in contravention of the 1961 Convention on Narcotic Drugs, which has been adopted by 186 countries, including Uruguay." Mr. Yans added that "cannabis is controlled due to its dependence-producing potential "and that" the current development in Uruguay, if pursued, would have serious repercussions for public health, particularly for youth, and would be in violation of the United Nations international drug control treaties."*²³¹

It should be noted that, unlike Canada, the cannabis legalization policy did not have majority popular support²³². It was a State policy promoted by the Government. For this reason, public health motivations, as well as those related to security and safety, may be more credible than those appealed by the North American country. However, it has not been possible to determine, considering the existing literature and the results so far of the policies undertaken, if Uruguay carried out the necessary studies to ensure that the legalization of cannabis would have a positive effect on the health of the population, especially of consumers, as well as on safety and security.

²²⁹ Congress of Uruguay, 'Marihuana y sus Derivados; Control y Regulación del Estado de la Importación. Producción, Adquisición, Almacenamiento, Comercialización y Distribución. (Law Nº 19.172, 2014) <http://www.diputados.gub.uy/proyectos/marihuana-y-sus-derivados-control-y-regulacion-del-estado-de-la-importacion-produccion-adquisicion-almacenamiento-comercializacion-y-distribucion/> accessed 18 November 2019

²³⁰ As in Portugal, possession of cannabis for personal use was allowed in Uruguay since 1974.

²³¹ International Narcotic Control Board 'INCB is concerned about draft cannabis legislation in Uruguay' (19 November 2013) Press Release UNIS/NAR/1186 <https://www.incb.org/documents/Publications/PressRelease/PR2013/press_release_191113e.pdf> accessed 15 December 2018

²³² José Miguel Cruz, Maria Fernanda Boidi and Rosario Queirolo, 'The status of support for cannabis regulation in Uruguay 4 years after reform: Evidence from public opinion surveys' (2018) 37 DAR 429

8.3.1 Controversy regarding the results of the policy

As noted, the Uruguayan authorities indicated that they would need a period of 4 to 5 years to be able to measure the effectiveness of this revolutionary policy. However, after that period, there are no clear studies by the Government that demonstrate either the success or failure of the measure. The national entity created to monitor and control cannabis in the country is the Cannabis Regulation and Control Institute. However, this entity does not seem to have received sufficient funds to be able to fulfil its mandate, and private investigations or conducted by the Government have not had the necessary funding either.

“When funding is needed for research in Uruguay, scientists look to the Agencia Nacional de Investigación e Innovación (National Agency of Investigation and Innovation) which has a budget of \$44 million. But the grants are highly competitive, and even if investigators meet all of the requirements, they can’t be assured they will get money for their proposals. Garcia said a proposal he submitted last year was deemed “excellent” by the agency, but “we didn’t get the financing, for lack of funds.” For the project, García proposed to chemically profile two cannabis sativa varieties as well as optimize the cannabinoid extraction process”²³³.

Although it has not been possible to obtain reliable information regarding the impact on public health of the legalization of cannabis²³⁴, it is important to consider if there is information related to the impact on safety and drug trafficking. Despite the fact that, as has been pointed out, it is not the motivation of this thesis to establish the effectiveness of the policies that are not framed in the Three International Drug Control Conventions, it is to be noted that there is data that would demonstrate that Uruguay faces an increase in homicides linked to disputes between drug traffickers as a result

²³³ Laura Olivieri, ‘What Have We Learned From the First Nation to Legalize Cannabis? Not Enough’ (*Cannabis Wire*, 6 July 2018) <<https://cannabiswire.com/2018/07/06/what-have-we-learned-from-the-first-nation-to-legalize-cannabis-not-enough/>> accessed 19 November 2018>.

²³⁴ Guillermo Cara, ‘Cuatro años de marihuana regulada en Uruguay: Aproximación al monitoreo y evaluación’ (*Friedrich Ebert Foundation*, December 2017). <<http://library.fes.de/pdf-files/bueros/uruguay/14523.pdf>> accessed 10 February 2019.

of the legalization of cannabis. Indeed, these policies have produced a decrease in part of the illicit drug market, which generates tensions over the control of the illicit points of sale, according to the research of Marcos Baudean, a researcher at the private University ORT, who monitors the impact of the law in the public security of the country²³⁵.

It is estimated that the cannabis consumer market involves about 40 million dollars (about 34.5 million euros) per year in Uruguay, of which ten million have already passed into the legal sector of the economy. As Baudean points out, when so much money passes in such a short time to the legal market, someone must have been affected, and this is coinciding with a clear increase in disputes located in certain areas, generally in poor peripheral neighbourhoods of Montevideo, where drug trafficking has been installed²³⁶.

In general terms, it does not appear that the liberalization of consumption in Uruguay has increased the consumption of marijuana in the country, which can be considered a point in favour of the measure. In Uruguay, there are four official records of drug use made in the last two decades. The National Household Surveys on Drug Consumption were conducted in 2001, 2006, 2011 and 2014 by the Uruguayan Drugs Observatory²³⁷. Together, these surveys show a sustained increase in the consumption of psychoactive substances during the 2000s in Uruguay. As of 2017, the figures show a slight growth in cannabis consumption in Uruguay, following the trend described. However, other drugs such as cocaine, which continue to be in a restrictive regime, also suffered an increase in consumption. In this sense, and contrary to what the detractors of the measure adopted by Uruguay

²³⁵ Magdalena Martinez, 'La legalización de la marihuana eleva la violencia entre narcotraficantes en Uruguay' (*El País*: Madrid, 10 August 2018) <https://elpais.com/internacional/2018/08/09/actualidad/1533827324_546108.html> accessed 12 January 2019.

²³⁶ Magdalena Martinez, 'La legalización de la marihuana eleva la violencia entre narcotraficantes en Uruguay' (*El País*: Madrid, 10 August 2018) <https://elpais.com/internacional/2018/08/09/actualidad/1533827324_546108.html> accessed 12 January 2019.

²³⁷ Clara Musto y Gustavo Robaina, 'Evolución del consumo de cannabis en Uruguay y mercados regulados' (Monitor Cannabis, 2018) <<http://monitorcannabis.uy/evolucion-del-consumo-de-cannabis-en-uruguay-y-mercados-regulados/>> accessed 18 November 2018

pointed out, there is no concrete data that demonstrate that a regulated market will increase drug consumption.

However, this simple fact does not represent a justification for Uruguay to violate its international commitments. Being able to demonstrate that the policy of legalizing cannabis yielded results that demonstrated an improvement in the quality of life, in public safety, in security, etc., could have been accompanied by a declaration that Uruguay was fulfilling its commitments related to the respect and improvement of the human rights of its citizens. However, this situation has not occurred. Even though, unlike in Canada, the philanthropic motivations of the Uruguayan government are more credible, so far, no evidence has been presented showing that Uruguay was in the need to abandon the three conventions as if these instruments were no longer providing an adequate legal framework to address comprehensively the drug issue in the country.

8.4 General remarks

The Netherlands was the first country in the world to generate a regulated cannabis market in the late 70s by not prosecuting its purchase in some establishments (coffee shops) and allowing the cultivation of plants at home. According to the European Monitoring Center for Drugs and Drug Addiction, in 2017 this country showed a level of cannabis use in the last year of 8.7% in the population between 15 and 64 years, a figure higher than the European average but lower than prohibitionist countries such as France (11.1%), Spain (9.5%), Czech Republic (9.4%) or Italy (9.2%)²³⁸.

For its part, within the American continent, the cradle of the War on Drugs, there is also a diversity of situations. In the northern hemisphere, the United States continues to be the largest consumer of cannabis in the world. Per the United Nations World Drug Report (2017), 16.5% of the US population

²³⁸ Clara Musto y Gustavo Robaina, 'Evolución del consumo de cannabis en Uruguay y mercados regulados' (*Monitor Cannabis*, 2018) <http://monitorcannabis.uy/evolucion-del-consumo-de-cannabis-en-uruguay-y-mercados-regulados/> accessed 18 November 2018

between 15 and 64 years of age reported having used cannabis in the last year, compared to 14.7% of Canadians. In the southern hemisphere, the proportion of Chileans who report having consumed in the last year increased from 11.3% in 2014 to 14.5% in 2016, while in Uruguay this figure increased from 9.3% in 2014 to 15.4% in 2017²³⁹. In short, per the same measuring instrument as the general prevalence surveys, the world experience indicates that neither the legal prohibition nor the regulation regimes guarantee a higher or lower level of consumption. Therefore, it cannot be argued that any of the strategies is more successful in terms of demand control.

If a country wishes to construct a legal domestic cannabis market, it has two choices which would stay within current international law. One is the path taken by Bolivia with respect to legalizing its domestic market in coca leaves: to denounce the relevant treaty or treaties, and re-accede with a reservation concerning cannabis (...) The other path is to legalize cannabis in its weaker forms. The cannabis which is controlled under the 1961 Convention is defined as the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated²⁴⁰.

The Three International Drug Control Conventions offer a wide range of possibilities for States to apply different drug control strategies. For example, while Peru and Thailand have obtained great results through alternative development programs to control illicit crops, other countries have preferred to implement harsh strategies of forced eradication. Two strategies of crops control very different from each other, but both framed in the three conventions. Regarding consumption, Portugal demonstrated that there was a way to reinterpret the conventions in such a way that highly innovative strategies could be applied that marked a before and after in the matter of drug control, but still without breaking (although stretching) the

²³⁹ Clara Musto y Gustavo Robaina, 'Evolución del consumo de cannabis en Uruguay y mercados regulados' (*Monitor Cannabis*, 2018) <http://monitorcannabis.uy/evolucion-del-consumo-de-cannabis-en-uruguay-y-mercados-regulados/> accessed 18 November 2018

²⁴⁰ Robin Room, 'Legalizing a market for cannabis for pleasure: Colorado, Washington, Uruguay and beyond' (2014) 109 (3) *Addiction* 345, 348

normative framework. And if any strategy to be applied could not be introduced in the normative framework of the three conventions, Bolivia, a small Andean country, had already set an important precedent in relation to the importance of staying within the normative framework of the IDCR, having withdrawn and then re-accessing the Single Convention of 1961 with a reservation.

Considering what has been pointed out, and with the examples mentioned above, there is no real reason that justifies why Canada and Uruguay, and to a certain extent the United States, have initiated drug control strategies that represent a violation of their international commitments in matters of drug control. Again, it is not the intention of this thesis to judge the effectiveness or not of the policies undertaken by these countries, although the subject of public health and the fight against organized crime, as indicated above, do not seem to have much support. However, the most logical step would have been to follow the path taken by Portugal to look for strategies framed in the relevant international instruments on the subject, to have withdrawn from the conventions, or simply to bring to international debate the need to review the cannabis control regime, which, although it would involve a long and arduous work of politics and diplomacy, would not imply an open contempt for the commitments assumed voluntarily.

The Three International Drug Control Conventions have the ultimate goal of the welfare and health of humanity. The provisions of these instruments, supplemented by other agreements such as the United Nations Convention against Transnational Organized Crime (UNTOC) or the United Nations Convention against Corruption (UNCAC), offer a sufficiently broad legal framework to address aspects of health, safety, human rights, among others, related to the World Drug Problem. The countries that have opted for the legalization of cannabis for recreational purposes have gone against their international commitments without being able to demonstrate that this was necessary.

9. Conclusions

This thesis has sought to address the current situation of the International Drug Control Regime to understand how the three International Drug Control Conventions may or may not adapt to the new needs and realities of the States. As it was observed during the historical review of this research, the different international drug control regimes have been adapted over the centuries to the different interests of the governments, fundamentally of the dominant powers, which have often imposed their own vision of the regimes. It has been observed, for example, how during the Opium War economy and trade were two of the main motivations that led the British Empire to impose its interests on China, even though opium consumption in Great Britain was forbidden for a long time. In the same way, we find that economic interests might still be behind the motivations of different countries to legalize cannabis for recreational purposes.

It is remarkable to note that since the Opium War, moral and public health aspects have already been established as an excuse to seek to apply different policies on drugs. The specific case refers to the Chinese Empire, which sought to prohibit the consumption of opium in that country, arguing the damage it did to its population, even though this justification was also used to hide the economic and commercial issues that China had related to general trade with the United Kingdom.

The Opium War and its consequences determined the way in which drug policies would be established worldwide until new interests and new actors (and new drugs) appeared. An example of this is how the United States and companies from that country were frequent consumers of cocaine and products made from coca leaf. Nevertheless, after society began noting the negative effects of drug addiction, *"politicians, religious leaders, pharmacists, doctors, and journalists spoke out for tighter controls on drug use"*²⁴¹.

²⁴¹ Ron Chepesiuk. *The War on Drugs: An International Encyclopedia*. (ABC-CLIO 1999).

Thus, at the beginning of the twentieth century, the moral and public health arguments related to the drug problem began to be stronger than economic interests, even though the United Kingdom and the Royal Commission on Opium continued to defend their right to market and profit from this product. However, the current regime began to take shape precisely at the time when people's concerns, whether religious or otherwise, took precedence over economic interests. The Single Convention of 1961, that gives formal and legal initiation to the current IDCR, starts by saying that the parties were concerned about the health and welfare of mankind. However, economic interests were never completely set aside, as was observed during the negotiation of the Convention on Psychotropic Substances of 1971. The regime of strict control of cannabis, opium and coca leaf of 1961 was promoted by the developed countries that wanted to establish greater security measures on the crops that were found mainly in the developing countries. However, the 1971 convention faced strong lobbying from pharmaceutical companies in developed countries, which feared that control measures that had not been included in the 1961 convention would result in economic losses.

9.1 The War on Drugs does not imply the failure of the regime nor the necessity to change it

The War on Drugs undertaken and financed by the United States and supported at the time by many international actors, is based mainly on stipulations of the three International Drug Control Conventions. That is, these instruments gave a legal framework to the repressive policies undertaken throughout the decades of the 1970s, 1980s and 1990s. The result of these policies, as has already been seen in this thesis, did not bring the international community closer to solve the World Drug Problem compared to 1961. However, this situation cannot serve as a justification for questioning the whole regime, considering that the punitive and even repressive aspects of drug policies are only part of the provisions of the conventions, which also consider others such as prevention, public health

and the general welfare of humanity. War on Drugs did not comprehensively consider all possibilities provided by the conventions.

There is no doubt that the IDCR allows restrictive and punitive policies. However, it also has allowed policies that are considered innovative, such as alternatives to incarceration, social reintegration, palliative treatments, the decriminalization of consumption, the reduction of harm, among others. For example, the three conventions do not forbid the death penalty for drug related crimes, which is one of the main criticisms of actors such as the EU, but the conventions also do not oblige States to apply it. These instruments simply state that punishments must be proportionate to the crime, granting sufficient flexibility to the States to determine what a proportional response means.

The reason why many of these non-restrictive or non-punitive policies are considered innovative is simply because States have not implemented them so far, but not because they were not included within the normative framework of the three conventions. If one starts from the fact that the objective of the international drug control regime continues to be the welfare of humanity, then definitely the three conventions continue to provide sufficient margin for States to develop different strategies. The decriminalization of possession, acquisition and cultivation for personal use works reasonably conveniently within the limits of the three conventions. Harm reduction services, including drug consumption rooms, also work legitimately within the framework of the regime. All these are strategies used in recent years by those States that prioritize the social and public health aspects of the WDP and have produced positive results. It is possible to provide health and social support instead of imposing a punishment on people involved in minor drug offenses related to personal use or socio-economic needs. Likewise, the conventions allow but do not oblige the medicinal use of drugs, including cannabis.

9.2 The International Drug Control Regime allows new responses and developments towards addressing the World Drug Problem

Especially since 2000, some State Parties have taken advantage of the flexibility of the regime, reinterpreting the provisions of the three conventions, to apply even more innovative strategies in relation to their own interests. And they have done it without the need to break with the regime, despite having been close many times. When the conventions were negotiated and established, the idea of harm reduction programs, such as those related to intravenous drug use in which the State grants drug addicts alternative substances to control addiction, was not imaginable. Today, many countries of Western Europe and Oceania have been applying them in direct coordination with the INCB. The regime has also been liberalized around the possession and personal cultivation of controlled substances such as cannabis, even though the INCB still resists to accept these trends since they can lead to the establishment of a controlled market. In other cases, State policies have interpreted the limits of the treaties even more loosely, for example through the introduction of drug consumption rooms developed by European countries such as Germany to control the spread of diseases by injectable drugs, providing syringes financed by the Government.

There is a high range of possibilities for Member States, and most of these possibilities are not mandatory. As we have seen throughout this thesis, those provisions that are mandatory for States are really limited to very specific areas, such as ensuring that controlled substances and their precursors are used only for medical and scientific purposes, avoiding its deviation. In this same line, the IDCR seeks to ensure enough availability of these controlled substances for medical purposes, for which the INCB plays a fundamental role.

9.3 The International Drug Control Regime based on the three Conventions, provides flexibility regarding to its implementation, whenever limited

As it was explained in chapter 3 of this thesis, the flexibility of a regime has limits, which are determined by the fundamental principles and norms that are at the core of the international regime, around which the expectations of the actors converge and that determine which practices will be considered legitimate and acceptable. If the practice is consistent with the fundamental core of principles and norms, then it can be considered within acceptable limits. If, on the contrary, a practice does not completely follow the main principles and norms but there is space for reinterpretation, it can be considered that States are making use of the margins of flexibility of the international regime. In this case, however, both the limits and the margins of flexibility of an established regime must be determined in each specific case, considering the practice a State wants to apply. This way, the practice can only be considered as a deviation or can lead to rupture, when the limits of flexibility of an international regime are crossed.

Considering the different case studies that have been analysed in this thesis, and per Constanza Sánchez Avilés, in her PhD thesis on the drug control regime in Spain, it can be noted that within the limits of flexibility of the regime, there are different political options that suppose a deviation, meaning that they do not imply a level of adherence and total fulfilments of the regime but neither a total rupture of their limits of flexibility. These deviations can be tolerated or objected by the institutions responsible for monitoring compliance with the regime, but States can justify their location within the margins of flexibility based on arguments related to ambiguity, capacity and adaptation to changing conditions. Therefore, depending on the degree of adherence to the principles and norms of the fundamental nucleus of the regime, Constanza Sánchez Avilés differentiates between three types of policies and practices: 1) those that comply with the acceptable level, whose adherence to the core is out of the question (in the case of the IDCR, INCB and CND would be the entities in charge of determining what is acceptable inside the regime); 2) those that deviate,

whose degree of adherence to the core is questioned but that move within the generally accepted margins of flexibility of the regime; and 3) policies and practices that do not comply with this fundamental core, which go beyond the regime's limits of flexibility and which, therefore, are not acceptable²⁴².

On the other hand, following Constanza Sánchez Avilés remarks in relation to the impact that State practices and policies may have on the stability or on prospects of change of an international regime, and taking into account the degree of acceptance or disagreement shown by the members of the regime and the institutions responsible for monitoring compliance, we will find policies and practices that can be qualified as: 1) those that strengthen the international regime, located within the acceptable limits of adherence and therefore promoted and accepted by the members and bodies responsible for monitoring compliance; 2) those that erode the regime, criticized and questioned within it, which in turn are divided into two types: mild eroding, including those that imply a questioned deviation although, in general, admitted by the institutions of the regime; and serious eroding, given that they represent a deviation strongly objected by members and institutions, but solidly justified by national decision-makers; and, finally, 3) those which go beyond the limits of flexibility of the regime and, therefore, are inadmissible by the agencies in charge of monitoring compliance, although sometimes the States try to justify their location within the margins of regime flexibility.

The flexibility provided by the three conventions and the International Drug Control Regime is facing currently serious and unprecedented challenges since its formal establishment in 1961, one of them clearly related to the fact that there is no space for free or controlled market for cannabis or other drugs for recreational purposes. It is no longer just an adaptation and reinterpretation of the three International Drug Control Conventions, but a

²⁴² Constanza Sánchez Avilés, 'El régimen internacional de control de drogas: formación, evolución e interacción con las políticas nacionales El caso de la política de drogas en España' (PhD tesis, Universitat Pompeu Fabra 2014)

direct attempt by certain States notably to break with what is stipulated in the legally binding documents.

9.4 The flexibility of the three conventions is continuously put into practice

Throughout this thesis, it has been sought to determine how flexible the three International Drug Control Conventions are considering the different responses State Parties want to give to the WDP. It has not been necessary to carry out an in-depth analysis of those countries that apply policies that strengthen the current IDCR, considering that the number of States that seek to limit the use of narcotic drugs for medical and scientific purposes continues to be a majority, applying a high range of possibilities allowed by the three conventions to do so. In this line, States apply restrictive measures, such as deprivation of liberty, or more permissive measures in relation to the demand and consumption, considering the wide freedom that the three conventions give for it. The analysis carried out in this thesis on the alternatives to incarceration clearly demonstrated that the three conventions require States to implement measures aimed at controlling drug related crimes, allowing them to determine which acts are considered crimes or not according to domestic legislation, as well as to determine which responses are proportional to the crimes committed. Consumption might be a crime in some States and not in others, both circumstances being allowed by the conventions.

9.4.1 Flexibility facing tough cases

The cases of Bolivia, the United States, Uruguay and Canada are probably the most direct examples of eroding policies, that is, those that do not fit within the core of the regime nor can they move within the margins of flexibility of it. The great difference shown in these cases is the way in which the States that applied these policies reacted after, both legally and politically.

As has been shown in this thesis, Bolivia set a precedent within the IDCR by having withdrawn from the Single Convention of 1961 with the sole objective of returning to that instrument with a reservation that would allow the country to continue with the cultivation of coca leaf for traditional purposes. Indeed, Bolivia took a high risk, given that there was a possibility that the States parties to the regime would not accept this reservation, which would have left Bolivia outside a regime that did not want to leave. However, due to diplomatic work, or simply due to lack of interest from other States parties, the Bolivian reservation was accepted. The consequences of this act should not be understood only in relation to the cultivation of the coca leaf; the Bolivian example served to establish further flexibility even beyond the perceived limits of former flexibility of the IDCR.

The example established by Bolivia clearly indicates that, when a country does not wish to continue complying with certain provisions of the three international conventions, there is a way forward. It is not necessary to violate the conventions to establish innovative strategies. In this sense, if there are countries that wish to apply measures such as the legalization of cannabis for recreational purposes, they should denounce the 1961 convention to seek re-entry with a reservation. However, as it is seen today, this has not happened. The United States, on the one hand, excuses itself arguing that its federal policy continues to be in accordance with the provisions of the three conventions, although some states, increasingly, are opting to allow the recreational commercialization of cannabis. Canada and Uruguay, for their part, do not directly refer to a violation of the three conventions, although this is evident, but they argue that their policies are in line with their commitments on human rights and security that must be provided to their populations.

This situation generates a problem within the IDCR. If the Bolivian State, landlocked country in the middle of the Andes could follow the established procedures to generate a situation that allows it to go against essential provisions of the three conventions, there is no reason or justification for Canada and Uruguay for not following the same path. And, as has been pointed out, this situation generated by Bolivia is part of the current flexibility

of the regime that did not exist two decades ago but which nowadays, due to the established precedent, generates a new opportunity.

Naturally, the example set by Bolivia has limits, and cannot become a tool used by a considerable number of parties, since that would undermine the integrity of the regime. The Bolivian case can be considered as part of the flexibility of the regime if only a minority of States decide to act this way.

While the international community continues to believe that cannabis should not be used for recreational purposes, it can be said that the regime is increasingly believed by a growing number of States to be flexible enough to accommodate new needs. However, should other States decide to apply measures like those of Canada, Uruguay and the United States, the regime would face a larger crisis.

This leads to question whether the countries wishing to legalize drugs for recreational purposes are concerned about maintaining the integrity of the IDCR. Regrettably, due to specific issues of the regime that were already explained, the only consequence that has occurred regarding the violation of the international drug control system is the blaming and shaming by the INCB and other States parties. Although a different path could have followed such as the establishment of a reservation, at present the message that Canada, Uruguay and to some extent the United States are giving is that the IDCR can be violated with impunity. It should be noted that if these countries consider that the current regime is not effective, they should promote a broad dialogue within the CND and the United Nations that includes the possibility of reforming international conventions, especially in relation to cannabis. However, this has not happened, at least not officially.

But as has been defended throughout this research work, the IDCR is constantly evolving. And the perceptions, interests and needs of States have also evolved. What must be asked is if the regime has really evolved to a breaking point, and which are the real motivations of those States that are willing to break it. For example, there is a growing perception that the interventions of drug users should be done by physical and mental health professionals instead of drug enforcers. The repressive laws have not had

the desired effect during the so-called War on Drugs, and the voices advocating for drugs to be treated more as a public health problem than as a security problem are growing. New and innovative strategies that many countries are defending increasingly point to decriminalization.

It is at this point that a clear difference must be made, since the decriminalization of consumption is not the same as the decriminalization of drugs. While, as demonstrated in the Portuguese case, the decriminalization of consumption can enter within the flexibility of the three conventions that this thesis defends, the decriminalization of drugs or a specific drug goes against the international commitments established in the three conventions. Interestingly, the strategies promoted by Portugal that do fit within the IDCR have shown very positive results and have brought Portugal closer to winning its own "War on Drugs", if we understand this term in a broader sense and not only in the establishment of punitive measures. On the other hand, the "innovative" strategies undertaken by Uruguay, some states of the United States and by Canada, do not yield positive results at least in the short term, as the INCB has been pointing out. While it is true that it is still early to make an adequate analysis of the consequences of these policies, what remains clear is that all the possibilities offered by the IDCR have not yet been exhausted before using strategies that go against the regime.

The case of Portugal, presented in this thesis, shows that there is space to reinterpret the conventions and the regime, without having to break with it. Portugal defended for a long time the logic of the policies that it wanted to apply and embarked on a long process of dialogue with the INCB that culminated in a transcendental change in terms of how to understand the IDCR, not only for the "watchdog" but also by all the members of the regime. Portugal showed that quite liberal policies on consumption could coexist worldwide in the IDCR with highly restrictive policies applied in other countries, which demonstrates, once again, the flexibility of the regime.

The path taken by Portugal, like Bolivia, was not easy, and those countries had to face great resistance at the international level to continue maintaining

its policies, which at the time could have been classified as against the provisions of the conventions. However, the Portuguese strategy modified, in a certain way, the way of understanding the core of the regime, and it was demonstrated that these policies could go hand in hand with the objectives established in international conventions, given that essential elements such as the prohibition on marketing, tight control of production and limiting the use of narcotic drugs for medical and scientific use continued to be applied.

The IDCR is not perfect, and it is necessary for the Member States to constantly discuss it. It is the reason why the CND meets once a year in Vienna. However, the regime, so far, has not proven to be obsolete; on the contrary, the three international conventions have managed to survive for so long because they have demonstrated a capacity to adapt to new needs of the States. That is, they have been flexible enough to accommodate new strategies. And when it seemed that such flexibility was not enough, as in the Portuguese or Bolivian case, ways were found to accommodate national interests. However, it is recognized that many of the objectives established by the IDCR, such as achieving a drug-free society, eliminating demand, offering, money laundering linked to drug offenses, eliminating trafficking in precursors, among others, can be considered utopic, especially because since the establishment of the 1961 single convention they have not made much progress.

Nevertheless, the IDCR should be understood as a set of norms that should guide the actions of the States toward a common objective in the matter of drugs, whether these objectives are feasible or not. It is worrisome that some years ago, States were committed to eliminating drug abuse, while today they are willing to tolerate them and even to organize very lucrative businesses around them, such as the controlled cannabis market. The current drug control regime has evolved and will continue to evolve, this is also part of its flexibility. However, a serious discussion must clearly be organized in relation to the future of the regime, given the flagrant violations to the IDCR that are occurring and that, instead of diminishing, threaten to increase.

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